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MICHAEL RODAK, J

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1313

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION, COMMUNICATION EQUIPMENT AND SYSTEMS DIVISION,

Petitioner,

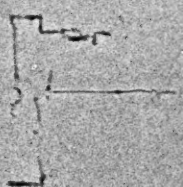
—v.—

LOCAL 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 25, 1974
CERTIORARI GRANTED MAY 13, 1974



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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
12- 3-70	Charge filed in Case No. 13-CD-209.
12-23-70	Notice of Hearing in 10(k) proceeding.
3-12-71	Hearing opened in 10(k) proceeding.
3-15-71	Hearing in 10(k) proceeding continued.
3-17-71	Hearing in 10(k) proceeding concluded.
6-30-71	Decision and Determination of Dispute, in 191 N.L.R.B. No. 122.
7-16-71	Motion for Reconsideration filed by Local 134, IBEW.
7-30-71	Answer of Communications Workers of America opposing Local 134's Motion for Reconsideration.
8- 2-71	Letter in opposition to Motion for Reconsideration filed by International Telephone and Telegraph Company.
8-17-71	Order of National Labor Relations Board denying Local 134's Motion for Reconsideration.
9-10-71	Complaint and Notice of Hearing.
9-20-71	Answer to Complaint and Notice of Hearing.
11- 4-71	Hearing before Trial Examiner in Case No. 13-CD-209.
11- 4-71	Hearing before Trial Examiner closed.
2- 7-72	Trial Examiner's Decision.
2-28-72	Local 134's request for oral argument before National Labor Relations Board.
2-29-72	Local 134's Exceptions to Trial Examiner's Decision and Supporting Brief.

DATE	PROCEEDINGS
3-28-72	International Telephone & Telegraph Company's Answering Brief, Cross-exceptions and Supporting Brief.
Undated	Communication Workers of America's Brief in Support of Trial Examiner's Decision.
6-22-72	Decision and Order in 197 N.L.R.B. No. 127.
10- 4-72	Petition to Review and Set Aside Order of the National Labor Relations Board filed by Local 134.
11- 1-72	Motion for Leave to Intervene filed by International Telephone & Telegraph Company.
11- 3-72	Cross-Application for Enforcement of an Order of the National Labor Relations Board filed by National Labor Relations Board.
Undated	Motion of Communications Workers of America for Leave to Intervene.
11-16-72	Order of Seventh Circuit granting International Telephone & Telegraph Company's Motion for Leave to Intervene.
11-20-72	Order of Seventh Circuit granting Communications Workers of America's Motion for Leave to Intervene.
4-18-73	Oral argument before Seventh Circuit.
9-20-73	Decision of Seventh Circuit in 486 F.2d 863.
9-20-73	Order of Seventh Circuit denying Application for Enforcement of Decision and Order of the National Labor Relations Board in 197 N.L.R.B. No. 127.
11-26-73	Order of Seventh Circuit denying Petitions for Rehearing filed by National Labor Relations Board, International Telephone & Telegraph Company and Communications Workers of America.

DATE	PROCEEDINGS
2-25-74	Petition for Writ of Certiorari filed by International Telephone & Telegraph Company.
Undated	Brief of Respondent CWA in support of Petition for Writ of Certiorari.
4-74	Memorandum on Petition for Writ of Certiorari filed by Solicitor General on behalf of National Labor Relations Board.
Undated	Brief in Opposition filed by Local 134.
5-13-74	Order of Supreme Court allowing Certiorari.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
THIRTEENTH REGION

Case No. 13-CD-209

LOCAL UNION NO. 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO

and

INTERNATIONAL TELEPHONE & TELEGRAPH CORPORATION, COMMUNICATIONS EQUIPMENT AND SYSTEMS DIVISION

NOTICE OF HEARING

PLEASE TAKE NOTICE that on the 4th day of January, 1971, at 10 a.m., in Room 823, Everett McKinley Dirksen Building, 219 South Dearborn Street, Chicago, Illinois, pursuant to Section 10(k) of the National Labor Relations Act, a hearing will be conducted before a Hearing Officer of the National Labor Relations Board upon the dispute alleged in the charge attached to the Notice of Charge filed, issued in this matter on the 3rd day of December, 1970. At said hearing, the parties will have the right to appear in person or otherwise and give testimony.

The dispute concerns the assignment of the following tasks in the Administration Building of the Village of Elk Grove, which is located at 191 Biesterfield Road, Elk Grove Village, Illinois:

> The installation, testing and maintenance of the PBX telephone switchboard and the installation of telephones, excepting telephones servicing the police and fire departments, at various locations in the building.

IN WITNESS WHEREOF, the undersigned Regional Director, on behalf of the Board, has caused this Notice of Hearing to be signed at Chicago, Illinois, on this 22nd day of December, 1970.

/s/ Ross M. Madden
ROSS M. MADDEN
Regional Director
National Labor Relations Board
Thirteenth Region
Everett McKinley Dirksen Building
Room 881, 219 South Dearborn Street
Chicago, Illinois 60604

WESTERN UNION TELEGRAPH—

Dated March 14, 1971

OGDEN W. FIELDS
Exec. Sect'y, NLRB
1717 Pennsylvania Ave., N.W.
Washington, D.C.

RE: Local 134 IBEW (ITT-CESD) Case No. 13-CD-209. 10K Hearing Local 134 requests special permission to appeal from following rulings of hearing officer. (I) Granting of Petition to Revoke part of subpoenas of Local 134 seeking evidence on legality of collective bargaining agreement now in evidence in Hearing Officer exhibit #1. Purpose of evidence was to advise Board of legality of contract which CWA and Employer urge as basis for CWA jurisdictional claim. Hearing officer granted petitions to revoke on theory that 10B period had run and no unfair labor practice could be found. Hearing officer reliance on Bryan Mfg. case is in error because: (A) he assumed the function of Trial Examiner or Regional Director by ruling on unfair labor practice charge; (B) was wrong as matter of law because Bryan Mfg. decision is predicated on notice to charging party, which is not present here because Local 134 had no knowledge of collective bargaining agreement until its application within the jurisdiction of Local 134 in December 1970; and (C) Hearing Officer is preventing Board from receiving evidence which will aid the Board in jurisdictional determination by preventing Board from giving consideration to collective bargaining agreement which was executed in violation of the Act and applied to Local 134's jurisdiction only after Employer waited for 10(l) period to run.

(II) Hearing officer's ruling that Employer may introduce evidence in support of its position that Board

should issue order which would be the determination of jurisdictional question on nationwide basis. Ruling is in error because Notice of Hearing sets dispute as work in Elk Grove Village Illinois which is in jurisdiction of Local 134 only and Board should determine that jurisdictional question which encompasses Local 134 only. Attorney for Local 134 only and not for International Brotherhood of Electrical Workers or any other Local of IBEW in this jurisdictional matter. Failure to amend Notice of Hearing, and to serve IBEW and any other local union of IBEW which might be affected by decision of Board is denial of due process to Local 134, IBEW, and any other local of IBEW which may be affected thereby because Local 134 cannot litigate matters beyond its knowledge. IBEW and other locals of IBEW are not given opportunity to appear at this hearing and to argue on matters which will ultimately affect them.

Local 134 requests Board grant permission to appeal from conduct set out above, and that Board order hearing officer to adjourn hearing until Board rules on appeal. Copies of this request will be served on hearing officer and other counsel of record at scheduled resumption of hearing; 9:30 AM, Central Time, March 15, 1971.

/s/ Robert E. Fitzgerald
ROBERT E. FITZGERALD
Attorney for Local 134, IBEW

Sender's Tel. No.: 922-3113

/s/ Robert E. Fitzgerald, Jr.
ROBERT E. FITZGERALD, JR.
53 W. Jackson Blvd.
Chicago, Ill. 60604

GOVERNMENT WIRE—Dated March 17, 1971

Re: *ITT Corporation, 13-CD-209*

Local 134, IBEW's request for special permission to appeal from Hearing Officer's ruling is hereby denied. By direction of the Board.

HAROLD F. LEBARON
Associate Executive Secretary
NLRB
Washington, D.C.

191 NLRB No. 122

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 13-CD-209

[Title Omitted]

DECISION AND DETERMINATION OF DISPUTE

This is a proceeding under Section 10(k) of the National Labor Relations Act, as amended, following the filing of a charge by International Telephone & Telegraph Corporation, Communications Equipment and Systems Division, herein called the Employer, alleging that Local Union No. 134, International Brotherhood of Electrical Workers, AFL-CIO, herein called Local 134, had violated Section 8(b)(4)(i) and (ii)(D) of the Act by engaging in certain proscribed activity with an object of forcing or requiring the Employer to assign the work in dispute to members of Local 134 rather than to employees of the Employer represented by Communications Workers of America, AFL-CIO, herein referred to as CWA.

Pursuant to notice, a hearing was held in Chicago, Illinois, before Hearing Officer Stephen S. Schulson on March 12, 15, and 17, 1971. All parties appeared at the hearing and were given full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues. Thereafter, briefs were filed by the Employer, Local 134, and CWA in support of their positions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National

Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Hearing Officer made at the hearing and finds them free from prejudicial error. They are hereby affirmed.[1] The Board has considered the entire record in this case, including the briefs, and hereby makes the following findings:

I. The Business of the Employer

The parties stipulated, and we find, that International Telephone & Telegraph Corporation, Communications Equipment and Systems Division, is engaged in the distribution and installation of electronic telephone equip-

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[1] We agree with the Hearing Officer's rulings that it was untimely for Local 134 to attack the validity of the collective-bargaining agreement between the Employer and CWA for 8(a)(2) purposes, and that material subpenaed by Local 134 was therefore not relevant. Section 10(b) would bar the issuance of a complaint attacking CWA's representative status as of the time the present contract was executed. *Local Lodge No. 1424, International Association of Machinists* v. *N.L.R.B. (Bryan Manufacturing Company)*, 362 U.S. 411. Accordingly, as CWA's representative status could not be litigated under these circumstances, we agree that such evidence could not be adduced in an 8(b)(4)(D) proceeding for the purpose of collaterally attacking CWA's status as statutory bargaining representative.

Local 134 alleges that it was denied substantive due process by what it considers inadequate notice as to the scope of the hearing, claiming that the Employer and CWA introduced evidence of events occurring beyond the jurisdiction of Local 134 and beyond its knowledge, thereby "tainting" the record. We disagree. The Board has consistently looked to the custom and practice of the industry, employer practice, and contract coverage as factors relevant to its consideration of the merits of the dispute. *International Association of Machinists, Lodge No. 1743, AFL-CIO (J. A. Jones Construction Co.)*, 135 NLRB 1402. Local 134 therefore had sufficient notice of the scope of the hearing on these matters. Further, the record, in our view, is of sufficient clarity to support a determination of dispute and an award confined to the area served by Local 134.

Accordingly, we find no merit in Local 134's requests to reopen the hearing.

ment and related products with facilities in the States of Connecticut, Illinois, Tennessee, New York, New Jersey, California, Florida, and other States. During the past calendar year, International Telephone & Telegraph Corporation, Communications Equipment and Systems Division, in the normal course and conduct of its operations, has received goods and materials valued in excess of $100,000 which were shipped to its facilities directly from across state lines. Accordingly, we find that International Telephone & Telegraph Corporation, Communications Equipment and Systems Division, is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organizations Involved

The parties stipulated, and we find, that Local Union No. 134, International Brotherhood of Electrical Workers, AFL-CIO, and Communications Workers of America, AFL-CIO, are labor organizations within the meaning of Section 2(5) of the Act.

III. The Dispute

A. *Background Facts*

In 1969, the Federal Communications Commission issued the *Carterfone* decision [2] which allowed private individuals or firms to purchase their own telephone equipment and have it "interconnected" with an operating telephone company system. Prior to this, operating telephone companies had refused to permit private telephone systems to be connected to the operating company's trunklines. The Communications Equipment and Systems Division of International Telephone & Telegraph Corporation was established shortly after the FCC decision, in

[2] 13 FCC 2d 420.

April 1969. The Employer is engaged in the sale, installation, testing, and maintenance of private telephone systems. The equipment sold by the Employer is manufactured by various divisions of International Telephone & Telegraph Corporation and is typically connected to the trunklines of the local operating telephone company.

The Employer entered into a contract with the Village of Elk Grove, Illinois, on August 27, 1970,[3] for the sale, installation, testing, and maintenance for 1 year of an EPABX[4] Model No. TE400 switching system and related telephone and circuitry work. The installation of this equipment involved the processes known as "pulling cable" and "terminating the cable;" the latter included installation of telephone instruments. The Employer subcontracted the work of "pulling cable" from the telephone room[5] to locations throughout the building to the C. A. Riley Electric Construction Co., a contractor whose employees are represented by Local 134. This work involved the pulling of 52 different cables and identification of each cable by physically tagging them so that it could readily be determined to which telephone sets they were to be connected. The Employer reserved the work of "terminating the cable" and the installation of the telephone instruments for its own employees, represented by CWA. C. A. Riley employees engaged in cable-pulling work from mid-November to mid-December. Employees of the Employer reported to the jobsite on December 3 and began installation of the EPABX equipment. At the request of village officials, made late in the day of December 3, the Employer did not return to the jobsite

[3] Unless otherwise noted, all events transpired in 1970.

[4] There is undisputed testimony in the record that the terms PBX, PABX, and EPABX are used interchangeably. The terms PABX and EPABX refer to refinements of the basic PBX system.

[5] Trunklines from the local operating telephone system were earlier installed by members of Local 134 employed by the Illinois Bell Telephone Company.

until December 21. The Employer thereafter completed the installation work on December 23.

B. *Work in Dispute*

The work in dispute herein is the installation, testing, and maintenance of the PBX telephone switchboard and the installation of telephones, excepting telephones servicing the police and fire departments, at various locations of the Elk Grove village administration building, Elk Grove, Illinois. The work in dispute is limited to that phase of the installation concerning termination of the cable and installation of the telephone instruments.[6]

C. *Contentions of the Parties*

The Employer contends that there is reasonable cause to believe that Local 134 has violated Section 8(b)(4)(D) of the Act, and that the record supports its assignment of the work in dispute to its employees represented by CWA. The Employer cites considerations of skill, industry and company practice, efficiency and economy of operations, and its collective-bargaining agreement with CWA in support of its assignment. Additionally, the Employer urges that the Board's award in this proceeding be nationwide in scope. CWA has taken a position basically consistent with that urged by the Employer regarding the work in dispute and the scope of the award.

Local 134 argues that the record is insufficient to support a finding that it engaged in any conduct that would amount to an unfair labor practice within the meaning of Section 8(b)(4)(D). It also contends that the work in dispute is within the jurisdiction of Local 134 and

[6] The Employer and CWA also argue the work of "cable pulling" should be assigned to employees represented by CWA. That work is not in dispute in this proceeding and, accordingly, we find it unnecessary to pass upon the merits of CWA's claim to that work.

should be assigned to individuals represented by it. Local 134 offers considerations of area practice, license requirements, economy, the alleged recognition of its jurisdiction by the Employer, the contract between the Employer and CWA, and the loss of job opportunities by members of Local 134, in support of its claim for the work in dispute.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of a dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated. The record indicates that on November 11, Local 134 Business Agent Van Wetering told a representative of the Employer that CWA does not install telephones in Cook County.[7] Later, on November 30, prior to the time employees of the Employer represented by CWA appeared at the jobsite, Van Wetering met with the Employer's director for labor relations, Foster, and stated that Local 134 did the installation and maintenance of telephone equipment in Cook County. Van Wetering also told Foster on that occasion that Local 134 better do the work or there would be "trouble."

On December 3, when the Employer began installation of the EPABX equipment with CWA-represented employees, there were Local 134 members employed by Johnson Electric Company, Illinois Bell Telephone Company, and C. A. Riley working at the jobsite. After a Local 134 steward ascertained that the Employer's employees were represented by CWA, he said, "We can't work here." Another Local 134 steward told other Local 134-represented employees that "if they [CWA] are working here we are leaving." Employees of all three contractors

[7] Elk Grove, Illinois, is located within Cook County, Illinois.

thereafter left the building site taking their tools with them.

Local 134 suggests that this testimonial evidence is incredible. In a jurisdictional dispute context, the Board is not charged with finding that a violation did in fact occur, but only that there is reasonable cause to believe that there has been a violation.[8] On this testimony, and without ruling on the credibility of the testimony in issue,[9] we are satisfied that there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred.

The parties have not submitted satisfactory evidence that they have adjusted or agreed upon methods for the voluntary adjustment of this dispute. Under these circumstances, we find that it will effectuate the policies underlying Sections 10(k) and 8(b)(4)(D) of the Act for us to determine the merits of the dispute. Accordingly, we find that this dispute is appropriate for resolution under Section 10(k) of the Act.

On the basis of the entire record in this case, we find that there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that the dispute is properly before the Board for determination.

E. *Merits of the Dispute*

Section 10(k) of the Act requires the Board to make an affirmative award of the disputed work after giving

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[8] *Locals 138, 138A, 138B, 138C, and 138D, International Union of Operating Engineers, AFL-CIO (Cafasso Lathing & Plastering, Inc.)*, 149 NLRB 156, 158-159.

[9] See *Local Union No. 3, International Brotherhood of Electrical Workers, AFL-CIO (Western Electric Company, Incorporated)*, 141 NLRB 888, 893.

due consideration to various relevant factors.[10] The Board has held that its determination of a jurisdictional dispute is an act of judgment based upon commonsense and experience reached by balancing those factors involved in a particular case.[11]

The following factors are relevant in making a determination of the dispute before us:

1. Certification and collective-bargaining agreements

Neither labor organization involved herein has been certified by the Board nor is there evidence indicating that a Board certification covers the disputed work.

The Employer is party to a current, nationwide collective-bargaining agreement with CWA. That agreement applies to "installation, replacement, and maintenance operations [of the Employer] in the United States or its possessions." Pursuant to this agreement, the Employer has assigned its employees represented by CWA to perform the work in dispute. The Employer is not, and never has been, party to any collective-bargaining agreement with Local 134. We conclude, therefore, that considerations of collective-bargaining history and agreements favor assignment of the work to employees represented by CWA.

2. Area, employer, and industry practice

Local 134 contends that only individuals represented by it have performed PBX installation in Cook County, except for the instant dispute. In support of this contention, Local 134 relies primarily on the fact that

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[10] *N.L.R.B.* v. *Radio & Television Broadcast Engineers Union, Local 1212, International Brotherhood of Electrical Workers, AFL-CIO (Columbia Broadcasting System)*, 364 U.S. 573, 586.

[11] *International Association of Machinists, Lodge No. 1743, supra.*

Illinois Bell uses its own employees represented by Local 134 to install PBX equipment in Cook County. There is, however, uncontradicted testimony indicating that employees of Western Electric represented by CWA install and test central office equipment in Cook County for the operating telephone company, Illinois Bell. There is substantial evidence in the record before us to indicate that the work of installing and testing central office switching equipment and the work of installing and testing a PBX system are to a large degree quite similar in nature. Both are intended to "switch" telephone messages, albeit central office equipment is often constructed on a larger scale than is the ordinary PBX system. We note, in this regard, the uncontradicted testimony of the Employer's witness, Fulton, to the effect that a central office equipment man for an operating telephone company would be ideally qualified, by virtue of training and experience, to be a communications technician, the title the Employer gives to its employees performing the work in dispute.

In further support of its claim that its members are entitled to perform the work in dispute on the basis, in part, of established area practice, Local 134 points to a franchise agreement between International Telephone & Telegraph and Midco, Inc., for the installation of interoffice communications equipment (PAX) manufactured by a division of IT & T in the years 1960 through 1968. Local 134 argues that the Employer thereby recognized its claim to work in dispute. Midco utilized employees represented by Local 134 when installing PAX equipment within the jurisdiction of Local 134. Midco installed only one PBX system, in 1970.

We conclude from the foregoing that considerations of area practice favor neither labor organization in making an award of the work in dispute; while Local 134 has performed all PBX work in the area, CWA-represented

employees have performed highly similar work within Cook County. Moreover, area practice alone would not play a controlling role in our decision herein.

The nationwide industry practice is to assign the disputed work to individuals represented by CWA. In this regard, the record shows that it is the Employer's practice, on a nationwide basis, to assign this work to employees represented by CWA. The record also discloses that all installation of PBX equipment manufactured by Western Electric, a competitor of the Employer, is installed by employees of Western Electric or operating telephone companies represented by CWA, with the exception of work performed in Cook County and the State of New Jersey. Employees represented by Local 134 and International Brotherhood of Electrical Workers install Western Electric's PBX equipment in those areas, respectively. We find that Employer and industry practice favor assignment of the work in dispute to employees represented by CWA.

3. Skills and training of employees

In support of its assignment to employees represented by CWA, the Employer argues that the work of electricians and the work of telephone men is completely dissimilar. Fulton testified that an electrician is neither trained in nor works with electronics or solid state circuitry, while electronics training is the basis for the work of a communications technician. Fulton estimated that it requires 6 years of training for one of its communications technicians to become "fully qualified" to install PBX systems. The Employer also conducts special training classes for particular items of its equipment, including a 4-week training program for the type of PBX installed in the instant dispute.

Local 134 has not alleged that its members have had any experience with the particular type of equipment in-

stalled in the Elk Grove Village project, although there are some 40 electricans registered with Local 134's hiring hall who are one-time Bell Systems employees, and at least some of these 40 have had experience with PBX equipment while with Bell. Local 134 maintains no separate listing of its PBX-qualified members.

The record establishes to our satisfaction that the work of a communications technician, as employed by the Employer, and an electrician, as represented by Local 134, is significantly different and requires dissimilar training and techniques. Indeed, Local 134 described itself in its brief as "a union whose members traditionally perform electrical work on new construction work in conjunction with other building trades unions." In our view, the work in dispute is not properly described as "electrical work on new construction work" but rather the installation of an item of highly sophisticated communications equipment. Accordingly, we find that consideration of the factors of skill and special training favor assignment of the disputed work to employees of the Employer represented by CWA.

4. Efficiency and economy of operations

The record indicates that communications technicians employed by the Employer and represented by CWA are paid at a substantially lower hourly rate than are journeymen electricians represented by Local 134. Communications technicians have a maximum hourly wage of $3.27 while a journeyman electrician is rated at almost $8 per hour. A journeyman employee of a sound contractor, also represented by Local 134, receives $5.48 on an hourly basis.

C. A. Riley Company made a bid of $2,600 for the work of terminating the cable. The Employer's witness testified that this bid was about $1,000 too high. Riley's bid for the termination work was based upon an ap-

proximate 200 hours of work, later reduced to an estimated 180 hours. The record indicates that employees of the Employer performed this same work in no more than 96 hours.

The sales agreement between the Employer and Elk Grove Village includes a provision that the Employer will perform necessary maintenance work for a period of 1 year. We have found that maintenance requirements often militate in favor of an employer's assignment, especially when factors of training in installation and service of an employer's specific equipment are present.[12] Such factors are present in the instant dispute. We find that factors of both economy and efficiency support an award of the work in dispute to employees represented by CWA.

5. Other factors

Local 134 has raised a number of other issues that, it alleges, supports its claim to the work in dispute. It argues that the Employer failed to comply with certain general licensing requirements for electrical work, and that such requirements extend to the installation of telephone communications equipment.[13] It is undisputed that the Employer was not issued a license for the performance of the work in dispute. The question of licensing, in these circumstances, is irrelevant. Local 134's

[12] See, e.g., *Radio-Television-Sound Technicians Local Union 1139, International Brotherhood of Electrical Workers, AFL-CIO (Motorola Communications and Electronics, Inc.)*, 180 NLRB No. 154.

[13] The Employer argues in its brief that the general licensing requirements for electrical work do not apply to the installation of telephone communications equipment and notes that Local 134's assertion is predicated exclusively upon an interpretation of an allegedly relevant ordinance by a supervisor of electrical inspection for Chicago. Respondent has offered no citation to a court of competent jurisdiction that has squarely ruled upon the applicability of these licensing requirements to the installation of telephone communications equipment such as is present in the instant dispute.

witness, a supervisor of electrical inspection for Chicago, testified on cross-examination that whether or not an employer's employees were represented by CWA, Local 134, any other union, or no union, was completely immaterial to the requirement of obtaining a license. Thus, licensing requirements, such as they may be, concern the employer's qualifications for the work and not its assignment of it. They provide no assistance in our consideration of the merits of this dispute.

Local 134 also claims that failure to award the work to it will result in a loss of job opportunities for its members. In the context of this case, we do not accord this argument great significance. There are approximately 6,000 to 8,000 individuals registered as construction electricians with Local 134's seniority system, and an additional 400 to 500 members of Local 134 are classified as sound, radio-television, and public address electricians. Contrasted with this, the Employer employs an approximately total of 50 communications technicians throughout the nation. The Employer has proposed to locate no more than six technicians in the Chicago area. It is apparent that an assignment of the work to individuals represented by CWA will have no substantial effect upon the job opportunities available to individuals represented by Local 134.

We do not find that the additional considerations alleged by Local 134 provide substantial support in favor of an award to individuals represented by that labor organization.

F. *Conclusions*

Having considered all pertinent factors present here, we conclude that employees represented by CWA are entitled to perform the work in dispute. This assignment is compatible with the collective-bargaining agreement between CWA and the Employer. Such an award is consistent with industry and employer practice, and is

not clearly inconsistent with area practice in Cook County regarding the installation of PBX and similar systems. In addition, members of CWA possess the requisite skills and training, the Employer has been satisfied with their performance, and continued assignment will result in greater efficiency and economy of operation. We conclude from all of the foregoing that the Employer's assignment of work to employees represented by CWA should not be disturbed. On the basis of the entire record, therefore, we shall determine the existing jurisdictional controversy by awarding the work in dispute to employees of the Employer represented by CWA. In making this determination, we are assigning the disputed work to the employees of International Telephone & Telegraph Corporation, Communications Equipment and Systems Division, who are represented by Communications Workers of America, but not to that Union or its members.

G. *Scope of the Determination*

The work which gave rise to the instant dispute has been completed. The Employer and CWA request the award encompass the Employer's entire operation, i.e., nationwide. Alternatively, the Employer and CWA request that the award encompass Cook County, Illinois. Local 134's position throughout the hearing and in its brief to the Board has been that the Notice of Hearing and, therefore, the scope of the work, was limited to the jurisdiction of Local 134, which generally consists of Cook County. As Local 134 has not indicated that it will renounce its claim to the work in dispute, and as the Employer has continued to seek sales agreements within Cook County that include performance of the work in dispute, we find that the dispute is likely to recur between the parties. We shall, therefore, encompass Cook County, Illinois, within the scope of our determination of the dispute.

DETERMINATION OF DISPUTE

Pursuant to Section 10(k) of the National Labor Relations Act, as amended, and upon the foregoing findings and the entire record in this case, the National Labor Relations Board hereby makes the following determination of dispute:

1. Employees of International Telephone & Telegraph Corporation, Communications Equipment and Systems Division, who are currently represented by Communications Workers of America, AFL-CIO, are entitled to perform the work of terminating the cable and installing telephone instruments in Cook County, Illinois.

2. Local Union No. 134, International Brotherhood of Electrical Workers, AFL-CIO, is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force or require International Telephone & Telegraph Corporation, Communications Equipment and Systems Division, to assign the above work to individuals represented by Local Union No. 134, International Brotherhood of Electrical Workers, AFL-CIO.

3. Within 10 days from the date of this Decision and Determination of Dispute, Local Union No. 134, International Brotherhood of Electrical Workers, AFL-CIO, shall notify the Regional Director for Region 13, in writing, whether or not it will refrain from forcing or requiring International Telephone & Telegraph Corporation, Communications Equipment and Systems Division, by means proscribed by Section 8(b)(4)(D) of the Act, to assign the work in dispute to individuals represented by Local Union No. 134, International Brotherhood of Electrical Workers, AFL-CIO, rather than to employees of International Telephone & Telegraph

Corporation, Communications Equipment and Systems Division, represented by Communications Workers of America, AFL-CIO.

Dated, Washington, D.C., June 30, 1971.

JOHN H. FANNING
Member

GERALD A. BROWN
Member

RALPH E. KENNEDY
Member

NATIONAL LABOR
RELATIONS BOARD

[SEAL]

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
THIRTEENTH REGION

Case No. 13-CD-209

[Title Omitted]

COMPLAINT AND NOTICE OF HEARING

It having been charged by International Telephone & Telegraph Corporation, Communications Equipment & Systems Division (herein referred to as ITT-CESD) that Local No. 134, International Brotherhood of Electrical Workers, AFL-CIO (herein referred to as Local 134 or the Respondent), has been engaging in and is engaging in unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, *et seq.* (herein called the Act), the General Counsel of the National Labor Relations Board, on behalf of the National Labor Relations Board (herein called the Board), by the undersigned Regional Director for the Thirteenth Region, hereby issues this Complaint and Notice of Hearing, pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations, Series 8, as amended, and alleges as follows:

I

The charge herein was filed on December 3, 1970, and an exact copy thereof was duly served on Respondent by registered mail on or about December 4, 1970.

II

ITT-CESD is engaged in the distribution and installation of electronic telephone equipment and related products

with facilities in the States of Connecticut, Illinois, Tennessee, New York, New Jersey, California, Florida and other states. During the past calendar year, International Telephone & Telegraph Corporation, Communications Equipment & Systems Division, in the normal course and conduct of its operations, has received goods and materials valued in excess of $100,000 which were shipped to its facilities directly from across state lines.

III

(a) ITT-CESD is an employer within the meaning of Section 2(6) and (7) of the Act and is a person engaged in commerce or in an industry affecting commerce within the meaning of Section 8(b)(4)(i)(ii), subparagraph (D), of the Act.

(b) Respondent has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

(c) The Communications Workers of America, AFL-CIO, hereinafter referred to as CWA, has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

IV

At all times material herein, the following-named persons occupied positions set opposite their respective names, and were agents of the Respondent within the meaning of Sections 8(b) and 2(13) of the Act:

Burton Van Wetering—Business Agent
Roger Becker —Steward

V

(a) On August 27, 1970, ITT-CESD entered into a contract with Village of Elk Grove, Illinois, for the sale,

installation, testing and maintenance of a PBX telephone switchboard and related telephone and circuit work at the Elk Grove Village Administration Building, Elk Grove, Illinois.

(b) On November 10, 1970, ITT-CESD subcontracted the "cable pulling" portion of the contract described above in subparagraph (a) to C. A. Riley Electric Construction Co. At all times material herein, C. A. Riley's employees involved herein were members of, and represented by, Local 134.

(c) At all times material herein, Charles Johnson Electric Co., Inc. was an electric subcontractor of Ruby Construction Co., the Village of Elk Grove's general contractor for the construction of its Administration Building. At all times material herein, Charles Johnson Electric Co., Inc.'s employees involved were members of, and represented by, Local 134.

(d) At all times material herein, Illinois Bell Telephone Company installed and maintained telephones of the police and fire departments at the Elk Grove Village Administration Building. At all times material, Illinois Bell Telephone Company's employees involved herein were members of, and represented by, Local 134.

VI

At all times material herein, ITT-CESD assigned the work of installation, testing and maintenance of a PBX telephone switchboard at the Elk Grove Village Administration Building, Elk Grove, Illinois, and the work of installing telephones, other than emergency instruments, at the above location, to communications technicians in its employ who are members of, and represented by, the CWA, and who are not members of, or represented by, Local 134.

VII

On or about November 30, 1970, Respondent, by its agent, Burton Van Wetering, demanded that ITT-CESD assign the work described above in paragraph VI to employees who are members of, or represented by, Local 134, rather than to employees who are members of, or represented by, the CWA.

VIII

At no time material herein has Local 134 been certified by the Board as the collective bargaining representative of any of the employees of ITT-CESD engaged in work described above in paragraph VI, and at no time material herein has the Board issued an order directing ITT-CESD to bargain with Respondent Local 134 as the representative of said employees.

IX

(a) On or about November 30, 1970, Respondent Local 134, by its agent Burton Van Wetering threatened ITT-CESD with "trouble" if ITT-CESD assigned the work described above in paragraph VI to employees who were members of, or represented by, the CWA, rather than to employees who were members of, or represented by, Local 134.

(b) On or about December 3, 1970, Local 134, by its agents, induced and encouraged employees of Charles Johnson Electric Co., Inc., Illinois Bell Telephone Company, and C. A. Riley Electric Construction Co. to withhold their services at the Elk Grove Village Administration Building. In response to said inducement and encouragement, the above employees walked off their jobs at the Administration Building on December 3, 1970.

X

By the acts and conduct set forth in paragraph IX above, Respondent has induced and encouraged individuals employed by Charles Johnson Electric Co., Inc., C. A. Riley Electric Construction Co. and Illinois Bell Telephone Company, and by other persons engaged in commerce, or in industries affecting commerce, to engage in strikes or refusals in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on goods, articles, materials, or commodities or to perform services, and has threatened, coerced and restrained ITT-CESD, and other persons engaged in commerce or in industries affecting commerce.

XI

An object of the acts and conduct of Local 134, set forth in paragraph IX was, and is, to force or require ITT-CESD to assign the work of installation, testing and maintenance of a PBX telephone switchboard and related telephones to employees who are members of, or represented by, Local 134 rather than to employees who are members of, or represented by, the CWA.

XII

On June 30, 1971, the Board issued the following determination of the dispute involved herein (191 NLRB No. 122):

> 1. Employees of International Telephone & Telegraph Corporation Communications Equipment and Systems Division, who are currently represented by Communications Workers of America, AFL-CIO, are entitled to perform the work of terminating the cable and installing telephone instruments in Cook County, Illinois.
>
> 2. Local Union No. 134, International Brotherhood of Electrical Workers, AFL-CIO, is not entitled by

means proscribed by Section 8(b)(4)(D) of the Act to force or require International Telephone & Telegraph Corporation, Communications Equipment and Systems Division, to assign the above work to individuals represented by Local Union No. 134, International Brotherhood of Electrical Workers, AFL-CIO.

XIII

On August 30, 1971, Counsel for Local 134 informed the Regional Director of the Thirteenth Region that Local 134 does not intend to comply with the Board's determination set forth above.

XIV

By the acts and conduct described in paragraphs IX, X and XI, and by each of said acts, Respondent engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(b)(4)(i)(ii), subparagraph (D).

XV

The acts of Respondent, and each of them, described in paragraphs IX, X and XI, occurring in connection with the operations of ITT-CESD, described in paragraphs II and III, have a close, intimate and substantial relation to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce within the meaning of Section 8(b)(4)(i)(ii), subparagraph (D), and Section 2(6) and (7) of the Act.

PLEASE TAKE NOTICE that on the 21st day of October 1971, at 10:00 a.m., in Room 824A, Everett McKinley Dirksen Building, 219 S. Dearborn Street, Chicago, Illinois, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the above complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony. Form 4668, Summary of Standard Procedures in

Formal Hearings Held Before the National Labor Relations Board in Unfair Labor Practice Proceedings Pursuant to Section 10 of the National Labor Relations Act, As Amended, is attached hereto.

You are further notified that pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, Series 8, as amended, the Respondent shall file with the undersigned Regional Director, acting in this manner as agent of the National Labor Relations Board, an original and four copies of an answer to said complaint within 10 days from the service thereof and that unless they do so all of the allegations in the complaint shall be deemed to be admitted to be true and may be so found by the Board.

Dated at Chicago, Illinois, this 10th day of September 1971.

/s/ Ross M. Madden
ROSS M. MADDEN
Regional Director
Thirteenth Region
National Labor Relations Board
Everett McKinley Dirksen Building
219 South Dearborn Street, Room 881
Chicago, Illinois 60604

Attachment

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
THIRTEENTH REGION

Case No. 13-CD-209

[Title Omitted]

ANSWER TO COMPLAINT AND
NOTICE OF HEARING

Now comes LOCAL 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, (hereinafter called Local 134), by its attorneys, ROBERT E. FITZGERALD, JR., and EDWARD J. CALIHAN, JR., and answers the complaint previously issued as follows:

1. Local 134 admits the allegations in Paragraphs I, II, III, V, VI, VII, and XIII.

2. Local 134 denies the allegations of Paragraphs IX (a), IX(b), X, XI, XIV, and XV.

3. Local 134 answers Paragraph IV by admitting that Burton Van Wetering is a Business Agent of the Union but denies that Roger Becker is a Steward or Agent.

4. Local 134 answers Paragraph VIII by admitting that it has received no Board certification for the work in question, but affirmatively states that the Board has recognized in other decisions that Local 134 has jurisdiction over this type of work in Cook County, Illinois, and further states to its knowledge the Communications Workers of America have not received a Board certification for this work in Cook County.

5. Local 134 answers Paragraph XII by admitting that the Board has previously issued the determination

of dispute containing the language set forth in Paragraph XII but it affirmatively states that the decision and determination of the Board contained additional findings not set forth in the complaint.

For the above and foregoing reasons, Local 134 requests that the Board dismiss the complaint previously issued.

Respectfully submitted,

/s/ Robert E. Fitzgerald, Jr.
ROBERT E. FITZGERALD, JR.

/s/ Edward J. Calihan, Jr.
EDWARD J. CALIHAN, JR.

53 West Jackson Boulevard
Chicago, Illinois 60604
WAbash 2-3113

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D.C.

13-CD-209

[Title Omitted]

Stephen S. Schulson, Esq., for the General Counsel.
John D. O'Brien, Esq., of Chicago, Ill., for the Charging Party.
Robert E. Fitzgerald, Jr., Esq., of Chicago, Ill., for Respondent I.B.E.W.
Jerome Schur, Esq., of Chicago, Ill., for the Intervenor, C.W.A.

TRIAL EXAMINER'S DECISION

Statement of the Case

Before THOMAS S. WILSON, Trial Examiner: Upon a charge duly filed on December 3, 1970, by International Telephone & Telegraph Corporation, Communications Equipment & Systems Division, herein referred to as ITT-CESD, the General Counsel of the National Labor Relations Board, herein referred to as the General Counsel [1] and the Board, respectively, by the Regional Director for Region 13 (Chicago, Ill.) issued its complaint dated September 10, 1971 against Local No. 134, International Brotherhood of Electrical Workers, AFL-CIO, herein referred to as Local 134 or Respondent.

[1] This term specifically includes the attorney appearing for the General Counsel at the hearing.

The complaint alleged that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(b)(4)(i)(ii)(D) and Section 2(6) and (7) of the Labor Management Relations Act, 1947, as amended, herein referred to as the Act.

Respondent duly filed its answer admitting certain allegations of the complaint but denying the commission of any unfair labor practices.

Pursuant to notice, a hearing was held in Chicago, Illinois, on November 4, 1971 before me. All parties, including Communications Workers of America, herein CWA, who were permitted to intervene, appeared at the hearing, were represented by counsel, and were afforded full opportunity to be heard, to produce and cross examine witnesses, and to introduce evidence material and pertinent to the issues. At the conclusion of the hearing oral argument was waived. Briefs were received from General Counsel, Respondent, ITT-CESD and CWA on November 29, 1971.

Upon the entire record in the case and from my observation of the witness, I make the following:

Findings of Fact

I. Business of Respondent

The complaint alleged, the answer admitted and accordingly I find:

ITT-CESD is engaged in the distribution and installation of electronic telephone equipment and related products with facilities in the States of Connecticut, Illinois, Tennessee, New York, New Jersey, California, Florida and other states. During the past calendar year, ITT-CESD, in the normal course in conduct of its operations, has received goods and materials valued in excess

of $100,000 which was shipped to its facilities directly across the state lines.

ITT-CESD is an employer within the meaning of Section 2(6) and (7) of the Act and is a person engaged in commerce or in an industry affecting commerce within the meaning of the Act.

II. The Labor Organizations

Local No. 134, International Brotherhood of Electrical Workers, AFL-CIO and Communications Workers of America, AFL-CIO, are labor organizations within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practice

A. *The Facts*

On August 27, 1970, ITT-CESD entered into a contract with the Village of Elk Grove, located in Cook County, Illinois, whereby ITT-CESD agreed to install and maintain for 1 year one of its PBX telephone systems in the new Administration Building of the Village of Elk Grove. On November 10, 1970, ITT-CESD subcontracted the necessary cable pulling work in connection with such contract to C. A. Riley Electric Construction Company whose employees were represented by Local 134. During all times material herein, employees of Charles Johnson Electric Company and Illinois Bell Telephone Company were also working in the new Administration Building. The employees of both these companies were also represented by Local 134.

On November 10, 1970 Lester Fulton, ITT-CESD supervisor of Maintenance and Installation of PBX Systems, met with C. A. Riley, president of C. A. Riley Electric Construction Company, who inquired as to who was going to do the cable termination and hanging of instrument work on the PBX system. Like a good busi-

nessman Riley wanted that work. Fulton answered that ITT-CESD would do that work with its own employees known as Communications Technicians, who, he informed Riley, were represented by CWA. Riley told Fulton that he, Riley, wanted to do the work and suggested that Fulton had best meet with Burton Van Wettering, a business agent for Local 134.

So the next day, November 11, Fulton met Van Wettering in Riley's office where, before excusing himself, Riley informed Van Wettering that ITT-CESD intended to do the terminal work on the PBX system with its own employees who were represented by CWA. Van Wettering then launched into a discussion of various union problems which had arisen and had been solved. He spent some 20 minutes over a problem of labor unions anticipated would arise with a project Leavitt and Son had in Cook County but which never arose due to prior discussions with the unions. Van Wettering told Fulton that the Cook County Building Trades knew that Leavitt and Son had built Leavittown, Pennsylvania, with nonunion help and so were prepared to "stop" Leavitt and Son on their project in Cook County if Leavitt and Son had tried to build that project with nonunion help. He told Fulton that at a pre-building meeting Leavitt and Sons decided to use union help so that the Cook County project proceeded unhampered. Lest the point be dismissed, Van Wettering brought out the fact that Leavitt and Son was also a subsidiary of ITT so that ITT-CESD was in the same category as Leavitt and Son. Van Wettering ended the conversation with a flat statement that CWA was not recognized in Cook County and that CWA would install no telephone equipment in Cook County.

On November 30, 1970 Joe Dale Foster, ITT-CESD Director of Labor Relations, met with Van Wettering at the Holiday Inn in Elk Grove Village and asked Van Wettering if he had any questions regarding the PBX

job in the Administration Building of the Village. Van Wettering stated that Local 134 installed all telephone and PBX equipment in Cook County, Illinois, along with the maintenance work thereon. Foster reminded Van Wettering that ITT-CESD had subcontracted the cable pulling work at the Administration Building to Riley as they had in New York City and in Los Angeles and asked why he could not accept that. Foster also explained that ITT-CESD had a nationwide contract with CWA covering the installation employees. Van Wettering's answer was that CWA did not do telephone work in Cook County, that to allow that would be to recognize CWA which only had some clerical employees in Cook County. Van Wettering then reiterated his story about the Leavitt and Son's project in Cook County, that the Building Trades were prepared to "stop the job" if Leavitt and Son had attempted to build the project with nonunion help but that, to their surprise, Leavitt and Son had decided at a pre-job conference to do the job with union help. As the men shook hands at parting, Foster said that he hoped there would be no hard feelings if Van Wettering did not get the PBX work. To this Van Wettering answered: "We'd better get that work or there will be trouble." He asked that Foster contact his superiors and then let Van Wettering know their decision.

About 9:15 p.m. on December 2, 1970 Foster telephoned Van Wettering and told him that ITT-CESD was going to do the PBX work in the Administration Building with its own employees beginning the next morning. Promptly after the receipt of this telephone call, Van Wettering telephoned the Local 134 business manager at his home and informed him that CWA men would work on the PBX job the next day. The business manager ordered Van Wettering to go to the jobsite the next day to see if CWA employees were in fact working there.

Van Wettering testified that, as ordered, he was at the jobsite the following morning about 8 o'clock. Before leaving shortly thereafter he testified he spoke to no one except to say "Hello" to Robert Becker, the steward for Local 134 on that job.

About 10:15 a.m. that day Fulton arrived at the Administration Building with Communication Technicians Louis Rodriguez and Dennis Satriano, who are headquartered in New York City. As they entered the telephone room in the basement of the building where their work was to begin, there were already two employees of Illinois Bell present and already at work. One of these two employees, known in this record only as "Bart," immediately upon their entry announced that "if they are working here I am leaving" and began packing up his tools preparatory to departure as did the other Bell Telephone employee. A minute or two later steward Becker entered the telephone room, showed his Local 134 card to Fulton and asked to see the cards of Rodriguez and Satriano. Rodriguez showed Becker his CWA card but Satriano had no card to show.[2] Becker immediately announced to those present that either "I can't work here" or "we can't work here."[3] After this comment Becker and the four or five other employees of Johnson Electric drifted away.

Becker remained on the job for a few minutes until it was time to have a coffee break with the rest of the

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[2] Becker testified that Satriano merely shrugged his shoulders as though he did not understand English while Fulton testified that Satriano explained in good English, which he spoke, according to Fulton, that he had forgotten to bring his card from New York. If this difference were material, I would credit the testimony of Fulton.

[3] In his oral testimony Fulton testified that Becker used the plural whereas his affidavit puts the phrase in the singular. According to Becker, after seeing Rodriguez' CWA card and having Satriano "shrug his shoulders," he merely thanked them and left the room.

employees from Local 134 and Jack Schutten, superintendent for Johnson Electric on the job. During this coffee break, Becker was asked about the two ITT-CESD employees and answered that one of them had a CWA card while the other showed no card. At the end of the coffee break Becker told the assembled Local 134 employees that he was going home because he did not want to work with "nonunion men." He thereupon departed for home. The other Local 134 employees also left the jobsite. From home Becker telephoned the union office and left word for the business manager that "there were nonunion men on the job."

No Local 134 employees worked in the Administration Building for the rest of the day.

That afternoon George Coney, Director of Finance for the Village of Elk Grove, invited Harold George, Regional Sales Manager for ITT-CESD, who happened to be in the telephone room at the time with the Communications Technicians, to come upstairs. As George entered the room Coney was talking to one Turnberg, superintendent for the General Contractor on the construction of the Administration Building. Coney asked Turnberg if the job would be completed. Turnberg answered that he could not complete the job if CWA was on the job. Thereupon Coney turned to George and asked if it would be possible not to have CWA on the job the following morning. George stated that it would be possible if Coney made a formal request. Coney made the formal request and George agreed that CWA would not be on the job the next morning. Coney thereupon turned to Turnberg and told him that CWA would not be on the job the next day. Turnberg then dialed a number on the telephone and reported to someone that CWA would not be on the job the next morning.

Late that afternoon Contractor Johnson of Johnson Electric telephoned Becker and informed him that he

"could go back to work there, that these other fellows weren't going to be there." Accordingly Becker returned to work on the morning of December 4. All the other Local 134 employees also returned to work that day.

The ITT-CESD technicians did not return to work until December 21 and thereafter completed their work on the PBX system. The Johnson Electric and Riley Electric employees had completed their work in the Administration Building by December 21.

On the afternoon of December 3, 1970, ITT-CESD through its attorney filed the charge in this case alleging that Local Union No. 134, International Brotherhood of Electrical Workers, AFL-CIO, had violated Section 8(b)(4)(i) and (ii)(D) of the Act by engaging in certain proscribed activity with an object of forcing or requiring ITT-CESD to assign the work in dispute to members of Local 134 rather than to employees of ITT-CESD represented by the Communications Workers of America, AFL-CIO.

A hearing on this dispute was held in Chicago, Illinois, before Hearing Officer Stephen S. Schulson on March 12, 15 and 17, 1971.

On June 30, 1971 the Board, finding that it was satisfied "that there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred," proceeded to determine the merits of the dispute and made the following specific determination of the dispute as follows:

1. Employees of International Telephone & Telegraph Corporation, Communications Equipment & Systems Division, who are currently represented by the Communications Workers of America, AFL-CIO, are entitled to perform work of terminating the cable and installing telephone instruments in Cook County, Illinois.

2. Local Union No. 134, International Brotherhood of Electrical Workers, AFL-CIO, is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force or require International Telephone & Telegraph Corporation, Communications Equipment & Systems Division, to assign the above work to individuals represented by Local Union No. 134, International Brotherhood of Electrical Workers, AFL-CIO.[4]

On August 30, 1971, Local 134 admittedly informed the Regional Director of the Thirteenth Region that Local 134 did not intend to comply with the Board's aforementioned determination of dispute.

B. *Conclusions*

The evidence here provides and I, therefore, find that:

1. On November 11, 1970 [5] and again on November 30, 1970, Union Agent Burton Van Wettering threatened, coerced and restrained two separate agents of ITT-CESD by warning that, unless ITT-CESD assigned the remaining PBX work of terminating cables and hanging instruments for the PBX system which ITT-CESD had

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[4] Respondent Union ends the first section of its brief as follows:

> Local 134 urges the Trial Examiner to recommend to the Board that it reconsider the previous decision [Decision and Determination of Dispute, 191 NLRB No. 132] because it was in error to have issued that decision in conflict with the above-cited authorities.

The short answer to this is, of course, that, as a Trial Examiner of the National Labor Relations Board, I enjoy no appellate jurisdiction over the actions of that Board but, on the contrary, am bound by the decisions of that Board.

[5] Despite Respondent's objection voiced for the first time in its brief, I use the events of this date although, as stated in the brief, the date was not alleged in the complaint because, despite that omission in the complaint, the conversation here found was fully litigated at the hearing.

contracted to install and maintain in the Administration Building of the Village of Elk Grove to members of Local 134 instead of to members of CWA, the work in the Administration Building and on that system would be "stopped."

In the conversation on November 11 this threat, while not stated in so many words, was made explicitly during Van Wettering's 20-minute harangue about how the Cook County Building Trades Council had decided "to stop" a Leavitt and Son project in Cook County unless Leavitt and Son decided to use union labor in the construction of the project instead of the nonunion labor which Leavitt and Son had used on its Leavittown project in Pennsylvania. This threat was explicit enough during his 20-minute lecture but Van Wettering left nothing to chance when he pointed out that Leavitt and Son was, like ITT-CESD, an affiliate of ITT so that the two organizations were in exactly the "same category." The threat to shut down the Elk Grove administration project was implicit in everything Van Wettering had to say on November 11. A man need not be hit over the head to know that he is being threatened and coerced.

On November 30 Van Wettering went through this same 20-minute threatening harangue to another agent of ITT-CESD as to what would happen unless ITT-CESD assigned the remaining PBX work in the Village Administration Building to members of Local 134 instead of to ITT-CESD's own employees who were members of the CWA. On this second occasion, apparently bewildered that his first threats and coercion had proved unsuccessful, Van Wettering made the threat explicit by ending the conversation with the statement that, unless ITT-CESD assigned the remaining work on the PBX system

to members of Local 134 "there will be trouble." This time Van Wettering was leaving nothing to chance.[6]

After Van Wettering's threats and coercion were proved unavailing as indicated by the telephone call of 9:30 p.m. to him on December 2 that ITT-CESD was assigning the work to its own employees, Van Wettering's prophecy was fulfilled on December 3 at the exact time that the ITT-CESD communications techniques began work in the Administration Building. This stoppage by Local 134 hardly appears to have been a mere concidence.

Upon the anticipated arrival of the ITT employees, the Local 134 steward, Thomas Becker, promptly checked the cards of the two technicians and found one with a CWA card and that that the other had forgotten his card in New York City. Becker, knowing full well what the ITT-CESD technicians were on the premises due to his inspection of the work to be done, promptly stated "I am leaving because I do not care to work with non-union men." [7]

Despite this statement, however, Steward Becker did not immediately depart the premises as promised but carefully waited until after he had had coffee with all the other Local 134 employees on the job, employees of Johnson, Illinois Bell, and also of Riley. At the end of coffee and after explaining that one ITT-CESD technician had a CWA card and the other none, Steward

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[6] Respondent relies upon the denial by Van Wettering that he ever made the "there will be trouble" statement—which was the only element in either conversation which Van Wettering denied. The threat was there whether or not Van Wettering uttered the disputed words. These words merely made explicit what might be said to have been perfectly implicit theretofor. I have no doubt that Van Wettering on the second occasion became explicit. That was the purpose of the conversation.

[7] It is to be noted here that Becker, despite this statement, knew that Rodriguez, at least, was a union man, albeit a member of CWA.

Becker announced to that assembly that he was leaving because he did not care to work with "nonunion men." [8] By this statement and by his action, Steward Becker at least sought to, and did, induce and encourage the other Local 134 members employed by Riley Electric "to refuse to perform any service" in the course of their employment. The encouragement was sufficient so that all Local 134 members left the premises at or about this time.[9]

Van Wettering's conversations with the ITT agents made the object of his and Becker's actions so clear that no discussion of that is here required. Local 134 was going to do the ITT CESD PBX work in Cook County instead of the CWA employees or else the work in the Administration Building would be "stopped." This is prohibited by Section 8(b)(4)(D) of the Act.

Hence we have an agent of a labor organization, Steward Becker, inducing and encouraging employees of a person engaged in commerce and in an industry affecting commerce to refuse in the course of their employment to perform any services for the purposes of forcing or requiring an employer, ITT-CESD, to assign work in members of Local 134 instead of to employees represented by CWA which is a violation of Section 8(b)(4)(i)(D) of the Act.

Then we have an agent of a labor organization, Business Agent Van Wettering, threatening and coercing a

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[8] This plural is Becker's.

[9] I include only the employees of Riley Electric Company in this for the technical—but unrealistic—reason that neither Johnson Electric nor Illinois Bell were alleged, or proved, to be "persons engaged in commerce or in an industry affecting commerce" and hence the employees of these two employers do not fit the description of Section 8(b)(4)(i). The employees of Riley, on the other hand, were engaged in work subcontracted from ITT-CESD which was admittedly an employer described in that section of the Act and hence Riley's employees would necessarily fit within Section 8(b)(4)(i) of the Act.

person admittedly engaged in commerce or in an industry affecting commerce, ITT-CESD, with the object of forcing that employer to assign particular work, the PBX system work in the Administration Building of the Village of Elk Grove, to Local 134 members instead of to employees of ITT-CESD who happen to be members of CWA which is a violation of Section 8(b)(4)(ii)(D) of the Act.

IV. The Effect of the Unfair Labor Practices upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with the operations of ITT-CESD described in section I, above, had a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

The Remedy

Having found that Respondent has engaged in unfair labor practices proscribed by Section 8(b)(4)(i) and (ii)(D) of the Act I shall recommend that it cease and desist therefrom and take certain affirmative action designed to remedy the unfair labor practices of this nature.

Conclusions of Law

1. International Telephone & Telegraph Corporation, Communications Equipment & Systems Division and C. A. Riley Electric Construction Co. are engaged in commerce or in an industry affecting commerce within the meaning of the Act.

2. Local 134, International Brotherhood of Electrical Workers, AFL-CIO, and Communications Workers of America, AFL-CIO, are labor organizations within the meaning of the Act.

3. Local 134 has failed and refused to comply with the Board's Decision and Determination of Dispute dated June 30, 1971 [191 NLRB No. 122].

4. Respondent, by threatening ITT-CESD and inducing and encouraging employees of an employer engaged in commerce to engage in a strike or a refusal in the course of his employment to perform any services for the purpose of forcing or requiring ITT-CESD to assign particular work to members of Local 134 rather than to ITT employees, represented by CWA, has engaged in unfair labor practices within the meaning of Section 8(b)(4)(i) and (ii)(D) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recomemnded: [10]

RECOMMENDED ORDER

Upon the foregoing findings of fact and conclusions of law, and upon the entire record in this case, I recommend that the Respondent, Local No. 134, International Brotherhood of Electrical Workers, AFL-CIO, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Engaging in, or inducing or encouraging any individual employed by C. A. Riley Electrical Construction

[10] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

Company, or by any other person engaged in commerce or in an industry affecting commerce, to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services; or threatening, coercing, or restraining ITT-CESD, or any other employer or person engaged in commerce or in an industry affecting commerce, where in either case described below to employees who are members of or represented by Respondent rather than to employees of ITT-CESD currently represented by CWA.

The work involved consists of:

Terminating the cable and installing telephone instruments in Cook County, Illinois.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Post in conspicuous places in the Respondent's business offices, meeting halls, and all other places where notices to members are customarily posted, copies of the attached notice marked "Apendix."[11] Copies of said notice, on forms provided by the Regional Director for Region 13, shall after being duly signed by the Respondent's authorized representative, be posted by Respondent immediately upon receipt thereof and be maintained by it for sixty (60) consecutive days thereafter. Reasonable steps shall be taken to insure that such notices are not altered, defaced, or covered by any other material.

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[11] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(b) Sign and mail sufficient copies of said notice to the Regional Director for Region 13 for posting by ITT-CESD and C. A. Riley Electric Construction Company at all locations where notices to their respective employees are customarily posted, if they are willing to do so.

(c) Inform its members of its obligations set forth in the provisions of the aforesaid notice, by reading such document during regularly scheduled meetings of the membership, and by mailing a copy of same to each of its current membership.

(d) Notify the Regional Director for Region 13, in writing, within 20 days from the date of the receipt of this Trial Examiner's Decision, what steps Respondent has taken to comply herewith.[12]

Dated at Washington, D.C.

/s/ Thomas S. Wilson
THOMAS S. WILSON
Trial Examiner

[12] In the event that this recommended Order is adopted by the Board after exceptions have been filed, this provision shall be modified to read: "Notify the Regional Director for Region 13, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith."

FORM NLRB—4726
(-71)

APPENDIX

NOTICE TO MEMBERS

[SEAL] [SEAL]

Posted by Order of the National Labor Relations Board
AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT engage in, or induce or encourage any individual employed by C. A. Riley Electric Construction Company, or by any other person engaged in commerce or in an industry affecting commerce, to engage in, a strike or a refusal in the course of his employment, to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services; or threaten, coerce or restrain any other employer or person engaged in commerce or in any industry affecting commerce, where in either case an object thereof is to force and require ITT-CESD to assign the work described below to employees who are members of or represented by Respondent rather than to employees of ITT-CESD, currently represented by Communication Workers of America.

The work involved consists of:

Terminating the cable and installing telephone instruments in Cook County, Illinois.

LOCAL NO. 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO
(Labor Organization)

Dated _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Everett McKinley Dirksen Building, Room 881, 219 South Dearborn Street, Chicago, Ill. 60604 Tel. No. (312) 353-7572.

197 NLRB No. 127

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 13-CD-209

[Title Omitted]

DECISION AND ORDER

On February 7, 1972, Trial Examiner Thomas S. Wilson issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief;[1] the Employer filed an answering brief, cross-exceptions, and a supporting brief; and the Intervenor, Communications Workers of America, AFL-CIO, filed a brief in support of the decision of the Trial Examiner.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record[2] and the Trial Examiner's Decision in light of the exceptions and briefs and has decided to affirm the Trial Examiner's rulings, findings, and conclusions and to adopt his recommended Order, with the modifications set forth below.

As more fully set forth in his Decision, the Trial Examiner found that shortly after the ITT employees arrived at the jobsite Respondent's steward, Becker,

[1] Attached to Respondent's brief were copies of the briefs it filed with the Board following the 10(k) hearing and its motion for reconsideration of our Decision and Determination of Dispute issued thereafter (191 NLRB No. 122).

[2] Respondent's request for oral argument is denied as, in our opinion, the record and the exceptions, cross-exceptions, and briefs adequately present the issues and the positions of the parties.

checked their union cards in the presence of other employee-members of Respondent and immediately announced either "I can't work here" or "We can't work here." However, he did not leave then, but shortly thereafter joined the foreman and other employees of Charles Johnson Electric Company, all of whom are represented by Respondent, for coffee.[3] During the conversation, Becker informed the other employees that one of the ITT technicians had a CWA card while the other showed no card. At the end of the coffee break, Steward Becker announced to the assembled employees, "I am leaving because I do not care to work with nonunion men." He thereupon left the jobsite and the other Johnson employees left after him.

It is clear from the totality of Steward Becker's conduct that he was not acting as an individual when he announced in advance his action to the assembled Johnson employees. He was acting in his role as steward when he inspected the union cards of the ITT employees and immediately made the statement referred to above. Rather than leaving the jobsite at that point, he joined the assembled Johnson employees for coffee. We can only infer that he did so to be certain that those employees were aware of the presence of the CWA members. It is apparent that his announcements of his findings regarding the union cards of the ITT employees and the action he was taking were a clear signal designed to "induce or encourage" the assembled Johnson employees to leave the jobsite as well.

We agree with the Trial Examiner that Respondent, by the above conduct of its steward, Becker, violated

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[3] Contrary to the Trial Examiner's finding that members of Respondent employed by Illinois Bell Telephone Company and C.A. Riley Electrical Construction Company were also present at this coffee break, the record shows that only Johnson's employees and foreman were present.

Section 8(b)(4)(i) of the Act. However, we base our finding on the fact that Steward Becker's conduct was directed at the employees of Johnson, not of, Riley. Contrary to the Trial Examiner, we are satisfied that the status of Johnson and Illinois Bell was in issue. The record fully establishes, and we find, that Riley, Johnson, and Illinois Bell, the secondary persons herein, are engaged "in an industry affecting commerce" within the meaning of 8(b)(4).[4] Accordingly, we shall modify the recommended Order to reflect our findings herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the recommended Order of the Trial Examiner, as herein modified, and orders that Respondent, Local No. 134, International Brotherhood of Electrical Workers, AFL-CIO, Chicago, Illinois, its officers, agents, and representatives, shall take the action set forth in the Trial Examiner's recommended Order, as so modified:

1. Delete from paragraph 1(a) "C. A. Riley Electrical Construction Company" and substitute therefor "Charles Johnson Electric Company."

2. Delete from paragraph 2(b) "C. A. Riley Electric Construction Company" and substitute therefor "Charles Johnson Electric Company."

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[4] *Sheet Metal Workers International Association, Local Union No. 299, AFL-CIO (S. M. Kisner and Sons)*, 131 NLRB 1196, 1199.

3. Substitute the attached notice for the Trial Examiner's notice.

Dated. Washington, D.C., June 22, 1972.

JOHN H. FANNING
Member

RALPH E. KENNEDY
Member

JOHN A. PENELLO
Member

NATIONAL LABOR
RELATIONS BOARD

[SEAL]

APPENDIX

NOTICE TO MEMBERS

Posted by Order of the National Labor Relations Board
AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT engage in, or induce or encourage any individual employed by Charles Johnson Electric Company, or by any other person engaged in commerce or in an industry affecting commerce, to engage in, a strike or a refusal in the course of his employment, to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services; or threaten, coerce or restrain any other employer or person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is to force and require ITT-CESD to assign the work described below to employees who are members of or represented by Respondent rather than to employees of ITT-CESD, currently represented by Communication Workers of America. The work involved consists of:

Terminating the cable and installing telephone instruments in Cook County, Illinois.

LOCAL NO. 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO
(Labor Organization)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Everett McKinley Dirksen Building, Room 881, 219 South Dearborn Street, Chicago, Illinois 60604, Telephone 312-353-7572.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 72-1822

LOCAL 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,
Petitioner,

—VS—

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION TO REVIEW AND SET ASIDE AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

TO: THE HONORABLE, THE CHIEF JUDGE AND ASSOCIATE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT:

Petition is hereby made for a review of a final order entered by the National Labor Relations Board (hereinafter called Board), which final order adversely affected the interest of the Petitioner and caused it to be an aggrieved party. The order is designated on the record of the Board as Local Union 134, International Brotherhood of Electrical Workers, AFL-CIO, and International Telephone and Telegraph Corporation, Communications Equipment and Systems Division, cited officially as 197 NLRB No. 127.

In support of this Petition, the Petitioner respectfully shows the Court as follows:

1. The Petitioner is a labor organization within the meaning of the Labor Management Relations Act, as

Amended, 61 Stat. 136, 29 U.S.C. No. 151 et seq., (hereinafter called the Act), which maintains its offices and performs its services within the judicial circuit of this Court.

2. The final order of the Board concluded that the Petitioner had violated Section 8(B)(4) of the Act and ordered Petitioner to cease and desist from certain action, to take other affirmative steps specified in the Board's decision and order, and further adopted a prior jurisdictional dispute determination which awarded certain work to a labor organization other than the Petitioner.

3. This Court has jurisdiction under the above-mentioned circumstances under the provisions of Section 10 (f) of the Act.

4. The nature of this proceeding below to which review is sought occurred chronologically as follows. An original unfair labor practice charge was filed by International Telephone and Telegraph Corporation, Communications, Equipment and Systems Division, (hereinafter called the Company) on December 3, 1970. Thereafter, the Board filed a Petition for Injunction under Section 10 L of the Act, in the Federal District Court for the Northern District of Illinois, Eastern Division on December 21, 1970. (Case No. 70 C 3190) Thereafter on January 20, 1971, the Petition for Injunction was dismissed by agreement of all parties.

Pursuant to notice a hearing was held on March 12, 15, and 17, 1971, concerning the judicial dispute matter before a hearing officer of the Board, under the authority of Section 10(k) of the Act. The Board issued its decision and determination of dispute on the jurisdictional question on June 10, 1971, awarding the performance of the disputed work to a labor organization other than the Petitioner.

On September 10, 1971, a Complaint was issued by the Board against the Petitioner alleging violations of Section 8(B)(4) of the Act, and on November 4, 1971, a hearing was held before a Trial Examiner of the Board. The Trial Examiner issued a preliminary order dated February 7, 1972, recommending the finding of a violation of Section 8(B)(4) of the Act by certain conduct of the Petitioner. The case was transferred to the Board and on June 22, 1972, the Board, with certain modifications in the Trial Examiner's decision, found a violation of the Section 8(B)(4) of the Act by the Petitioner and concurrently reaffirmed its prior decision and determination of dispute concerning the disputed work.

5. Petitioner respectfully submits that the Board erred in its initial decision and determination of dispute, in that the Board disregarded substantial evidence on the record as a whole and disregarded the law as enunciated by the Board and the Courts. Further, the Board erred in the finding of a violation of Section 8(B)(4) of the Act by the Petitioner in that its decision is unsupported by substantial evidence on the record as a whole and is contrary to law.

WHEREFORE, Petitioner prays that the Board's decision and determination of dispute and the Board's final order be reviewed and thereafter set aside and remand it to the Board for the issuance of a decision and order dismissing the Complaint in its entirety insofar as it finds a violation of Section 8(B)(4) by the Petitioner, and that it issue a decision and determination of dispute awarding the work to the Petitioner.

Respectfully submitted,

LOCAL 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, Petitioner

BY: /s/ Edward J. Calihan, Jr.
EDWARD J. CALIHAN, JR.

AND: /s/ Robert E. Fitzgerald, Jr.
ROBERT E. FITZGERALD, JR.
Its Attorneys

53 West Jackson Boulevard
Chicago, Illinois 60604
WAbash 2-3113

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 72-1822

[Title Omitted]

CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States Court of Appeals for the Seventh Circuit:

On October 4, 1972 pursuant to Section 10(f) of the National Labor Relations Act, as amended, (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, et seq.) Local 134, International Brotherhood of Electrical Workers, AFL-CIO instituted the captioned proceeding by filing with this Court a petition to review and set aside an order issued against it by the National Labor Relations Board on June 22, 1972 in a case appearing on the records of the Board as Case No. 13-CD-209.

Pursuant to Section 10(f) of the Act and Section 15 (b) of the Federal Rules of Appellate Procedure, the Board files this cross-application for enforcement of said order.

In support of this cross-application, the Board respectfully shows:

(1) The Petitioner is engaged in business within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this cross-application for enforcement by virtue of Section 10(f) of the National Labor Relations Act, as amended.

(2) Upon due proceedings had before the Board in said matter, the Board on June 22, 1972, duly stated

its findings of fact and conclusions of law, and issued an Order directed to the Petitioner, its officers, agents, and representatives. On the same date, the Board's Decision and Order was served upon the Petitioner by sending a copy thereof postpaid, bearing Government frank, by registered mail, to the Petitioner.

(3) Pursuant to Section 10(f) of the National Labor Relations Act, as amended, and Rule 17 of the Federal Rules of Appellate Procedure, the Board is certifying and filing with this Court a transcript of the entire record of the proceeding before the Board upon which the said Order was entered, which transcript includes the pleadings, testimony and evidence, findings of fact, conclusions of law, and the Order of the Board sought to be enforced.

WHEREFORE, the Board prays this Honorable Court that it cause notice of the filing of this cross-application and transcript to be served upon the Petitioner and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the Order made thereupon a judgment enforcing in whole said Order of the Board, and requiring the Petitioner, its officers, agents, and representatives, to comply therewith.

/s/ Marcel Mallet-Prevost
MARCEL MALLET-PREVOST
Assistant General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D.C. this 3rd day of Nov. 1972.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

November 16, 1972

Before Hon. ROGER J. KILEY, Circuit Judge

[Title Omitted]

PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

This matter is before the Court on the motion of International Telephone & Telegraph Corporation of November 1, 1972 requesting leave to intervene and be made a party to the above-entitled proceedings for all purposes including leave to argue orally before this Court and for leave to file briefs in this cause. On November 2, 1972 this Court ordered a response from the petitioner and respondent in this matter.

The responses having been received by the Court and due consideration having been given all the documents filed with this Court the matter of International Telephone & Telegraph Corporation is GRANTED.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

486 F.2d 863 (1973)

September Term, 1972—April Session, 1973

No. 72-1822

LOCAL 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,
Petitioner,

v.

National Labor Relations Board

*NATIONAL LABOR RELATIONS BOARD,
Respondent.

Argued April 18, 1973—Decided September 20, 1973

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[864] Before Swygert, *Chief Judge*, Murrah * and Barnes,** *Circuit Judges.*

Murrah, *Circuit Judge.* This is an appeal by a labor union from an order of the National Labor Relations Board (the Board) finding that the union had committed a § 8(b)(4)(D) unfair labor practice in a jurisdictional

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* Senior Judge Alfred P. Murrah of the United States Court of Appeals for the Tenth Circuit sitting by designation.

** Senior Judge Stanley N. Barnes of the United States Court of Appeals for the Ninth Circuit sitting by designation.

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* 13-CD-209; 197 NLRB No. 127.

dispute over installation of telephone equipment. The dispute arose in this way. The Communications Equipment and Systems Division of International Telephone & Telegraph Corporation (the Company) contracted with the Village of Elk Grove, Illinois, to sell, install, test, and maintain a private telephone system for the Elk Grove Village Firehouse and City Administration Offices. This work involved two stages, (1) "pulling cable," *i.e.*, routing the telephone cable to the telephone instruments, and (2) "terminating the cable," that is installing and testing the Private Branch Exchange (PBX) switch system and telephone instruments. The Company subcontracted the "pulling cable" phase to the C. A. Riley Electric Construction Co., whose employees are represented by Local 134, International Brotherhood of Electrical Workers, AFL-CIO (Local 134); the terminating phase was to be accomplished by Company technicians represented by the Communication Workers of America (CWA).

The Local 134 business agent objected to this work assignment telling Company officials that Local 134 did all telephone and PBX installation and maintenance work in that area, that CWA would not install telephone equipment in Cook County, and that "[w]e'd better get that work or there will be trouble."

When CWA technicians appeared at the job site to begin their assigned work, the Local 134 steward announced to his fellow workers either, "I can't work here" or "we can't work here."[1] He and the other Local 134 employees subsequently left the job site, and none returned until the Company agreed that no CWA employees would be on the site. When the Local 134 employees had finished "pulling" the cable, the CWA workers returned and completed the "terminating" phase.

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[1] There is some conflict in the evidence as to his exact words, but the difference is not material.

The Company then filed a charge alleging that Local [865] 134 had violated §§ 8(b)(4)(i) and (ii)(D) of the National Labor Relations Act, 29 U.S.C. §§ 158(b)(4)(i) and (ii)(D), which provide in presently material part that it shall be an unfair labor practice for a labor union or its agents to induce or encourage and employee.

> "(i) . . . to engage in . . . a refusal in the course of his employment to . . . perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is
>
> * * * *
>
> "(D) Forcing or requiring any employer to assign particular work to employees in a particular labor organization . . . rather than to employees in another labor organization. . . ."

A hearing on the charge, conducted by a hearing officer in accordance with the provisions of § 10(k) of the Act, 29 U.S.C. § 160(k),[2] resulted in a finding that employees represented by Local 134 were not entitled to the disputed work assignment, and that Local 134 was therefore not entitled to attempt to coerce or force the Company to assign the disputed work to its members. When Local 134 informed the Board's Regional Director of its decision not to acquiesce in the Board's determina-

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[2] Section 10(k), 29 U.S.C. § 160(k), provides that

"[w]henever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practices shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed."

tion, the Regional Director issued this unfair labor practice complaint. Upon a § 10(b) hearing, 29 U.S.C. § 160 (b), the Board adopted the § 10(k) findings, and accordingly determined that Local 134 had committed a § 8(b)(4)(D) unfair labor practice.

In this § 10(e) enforcement proceeding, Local 134 takes the position that all of the installation work involved here has customarily been performed by Local 134 and, relying upon Longshoremen and Warehousemen's Local 8 (Waterway Terminals Co.), 185 NLRB No. 35, and the rationale in Woodwork Manufacturers v. NLRB, 386 U.S. 612 (1967), contends that the Board erroneously found in the § 10(k) proceeding that the work should be awarded to CWA. In the *Waterway Terminals* and other referred cases the Board, recognizing the concept of customary work assignments, held that § 8(b)(4)(D) was not designed to proscribe union attempts to retrieve the jobs of employees whom the employer had supplanted by reallocating their work to others. Contrary, however, to the position of the union, we do not have a customary work assignment case in which work is usurped from workers of one union by reallocation of workers of another union. Testimony at the § 10(k) hearing clearly indicates that employees represented by CWA customarily install and test equipment similar to that involved here in Cook County, and the Board determined that by area, employer, and industry practice and by skill and training, the CWA employees were more entitled to perform the disputed work than employees of Local 134.

In the *Woodwork Manufacturers* case a trade association filed a § 8(b)(4)(B) charge, claiming that it was an unfair labor practice for carpenters to refuse to handle pre-cut and pre-fitted doors manufactured by a member of the association. The NLRB dismissed this particular charge (149 NLRB 646), and the Court of Appeals affirmed (354 F.2d 594, 599 (70th Cir. 1965)). The Su-

preme Court also affirmed, based upon the Board's [866] specific findings to the effect that the union's conduct involved only a primary contract dispute with the employer over preservation of job-site work customarily performed by the contracting union, rather than a secondary jurisdictional dispute between two unions, and was therefore not prohibited by § 8(b)(4). The court concluded that, viewed as a whole, § 8(b)(4) was manifestly intended to protect genuinely neutral employers from coercive pressures in disputes not their own; and rationalized that "[t]he prohibition of subsection (D) against coercion to force an employer to assign certain work to one of two unions contesting for it protects the employer trapped between the two claims." 386 U.S. at 625. In both *Woodwork Manufacturers* and *Waterway Terminals* the Board and the courts were concerned with the concept of customary work assignments, and simply applied that doctrine to exempt the disputes from the prohibitions of § 8(b)(4).

The insurmountable difficulty confronting the union here is that the salient and controlling facts of its case do not fit the facts of the cases upon which it relies. In our case the Company is a party to a collective bargaining agreement with CWA, covering installation operations, pursuant to which the work in question was assigned to CWA. At the § 10(k) hearing it was concluded that "considerations of collective-bargaining history and agreements favor assignment of the work to employees represented by CWA." Unlike the circumstances of *Woodwork Manufacturers* and *Waterway Terminals*, then, the Company assigned the work to CWA in accordance with a current collective bargaining agreement, but was coerced by Local 134 in an attempt to have the work assigned to employees the Local represents. In these circumstances the employer was "trapped" in a jurisdictional dispute between the two contesting unions. Stated another way, the Local 134 activities complained of did not involve a

primary dispute with the employer over fulfillment of its contract for work customarily performed, but were secondary pressures designed to influence the employer concerning a jurisdictional union dispute. Such is the very activity § 8(b)(4)(D) was intended to prohibit. 386 U.S. at 625. *See also National Labor Relations Board* v. *Local Union No. 9*, 255 F.2d 649 (4th Cir. 1958). We certainly cannot say that the Board's decision was not supported by the controlling facts of the case. *See, e.g., NLRB* v. *Akin Products Co.*, 209 F.2d 109 (5th Cir. 1953).

Compliance With the Requirements of the Administrative Procedure Act

Local 134 also contends that the Board violated Section 5 of the Administrative Procedure Act, 5 U.S.C. § 554, because the hearing officer in the § 10(k) proceeding subsequently served in a prosecutorial capacity as counsel for the General Counsel at the § 8 Unfair Labor Practice Hearing. Section 554 provides in presently material part that "[a]n employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review. . . ." The avowed purpose of this provision of the Act is to ". . . curtail and change the practice of embodying in one person . . . the duties of prosecutor and judge." *See Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 41 (1950). *See also Riss & Co., Inc.* v. *United States*, 341 U.S. 907 (1951). And it is true that in this case the presiding § 10(k) hearing officer also acted as a prosecutor at the Unfair Labor Practice Hearing.

In the Board's view it was not improper for the same person to perform the functions of hearing officer and subsequently prosecute an unfair labor charge based upon the evidence adduced at that hearing, simply because the

hearing was without binding effect on anyone. While this [867] is technically so, it is also true that the hearing officer's rulings at the § 10(k) hearing largely determine what evidence the Board will have to consider at the Unfair Labor Practice Hearing, in which the hearing officer participates as an advocate. It is, we think, an over-simplification to say that the § 10(k) hearing has no binding effect. As Justice White put it in *NLRB* v. *Plasterers' Union*, 404 U.S. 116, 126-127 (1971),

> ". . . the impact of the § 10(k) decision is felt in the § 8(b)(4)(D) hearing because for all practical purposes the Board's award determines who will prevail in the unfair labor practice proceeding. If the picketing union persists in its conduct despite a § 10(k) decision against it, a § 8(b)(4)(D) complaint issues and the union will likely be found guilty of an unfair labor practice and be ordered to cease and desist. On the other hand, if that union wins the § 10(k) decision and the employer does not comply, the employer's § 8(b)(4)(D) case evaporates and the charges he filed against the picketing union will be dismissed."

The Board also urges that the combination of functions did not violate the Administrative Procedure Act because the hearing officer performed his prosecutorial duties only after he had already presided at the § 10(k) hearing. But, as Justice Jackson cogently observed in *Wong Yang Sung*, *supra*,

> "[a] genuinely impartial hearing, conducted with critical detachment, is psychologically improbable, if not impossible, when the presiding officer has at once the responsibility of appraising the strength of the case and of seeking to make it as strong as possible. Nor is complete divorce between investigation and hearing possible so long as the presiding inspector has the duty himself of assembling and

presenting the results of the investigation." 339 U.S. at 44.

It is apparently admitted that § 554 applies to § 10(k) hearings. And § 556 of the Act provides in presently material part that, in hearings required to be conducted in accordance with § 554, ". . . [t]here shall preside at the taking of the evidence . . . one or more hearing examiners appointed under Section 3105 of the title." [3] Section 3105 provides in presently material part that hearing examiners ". . . may not perform duties inconsistent with their duties and responsibilities as hearing examiners." This is, we think, a specific manifestation of the congressional intent that administrative officers who preside at such hearings be completely "isloated," "impartial," and "independent" (*see, e.g.*, 92 Cong. Rec. A-2982 (1946), 92 Cong. Rec. 2160 and 2163 (1946), 20 Fed. B. J. 74-76 (1960), and 27 Fed. B. J. at 362 (1967); that there shall be no "commingling" of the functions of investigation or advocacy with the function of decision making. *See Wong Yang Sung, supra* at 44 *quoting* the Attorney General's Committee on Administrative Procedure. "It has been said that hearing examiners are the administrative equivalent of federal judges," [4] Indeed, the title of hearing examiner has recently been changed to "Administrative Law Judge." *That is, see* 37 Fed. Reg. 16787 (No. 162, Aug. 19, 1972).

In our case the hearing officer had the duty of hearing the evidence in the case, and subsequently urging and

---

[3] We assume that the § 10(k) hearing officer in this case is the equivalent of a hearing examiner for purposes of § 556, inasmuch as the statute so requires and no point was made of any distinction, either at the hearing or on appeal.

[4] *See comments* of Henry S. Sham, NLRB Trial Examiner, at 20 Fed. B. J. 74, 79 (1960), *quoting* Mr. Earl W. Kintner, then Chairman of the Federal Trade Commission.

relying upon it as prosecutorial evidence. We think that the knowledge on the part of the presiding officer that he [868] will subsequently advocate a position based upon his own evidentiary rulings at the § 10(k) hearing could very well influence his decisions at that hearing. This commingling of functions is plainly inconsistent with both the spirit and the letter of the Act, and, we think, incompatible with the accepted norms for the proper administration of justice. An order of the Board thus tainted should not be enforced.

Enforcement is accordingly denied.

A true Copy:
Teste:

Clerk of the United States
Court of Appeals for the
Seventh Circuit

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

September 20, 1973

Before
Hon. LUTHER M. SWYGERT, Chief Judge
Hon. ALFRED P. MURRAH, Senior Circuit Judge *
Hon. STANLEY N. BARNES, Senior Circuit Judge **

[Title Omitted]

PETITION FOR REVIEW OF A DECISION OF THE NATIONAL LABOR RELATIONS BOARD

This cause came on to be heard on the transcript of the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the application for enforcement of a decision of the National Labor Relations Board entered in this cause on June 22, 1972, be, and the same is hereby, DENIED, in accordance with the opinion of this Court filed this day.

---

* Senior Judge Alfred P. Murrah of the United States Court of Appeals for the Tenth Circuit sitting by designation.

** Senior Judge Stanley N. Barnes of the United States Court of Appeals for the Ninth Circuit sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

November 26, 1973

Before
Hon. LUTHER M. SWYGERT, Chief Judge
Hon. ALFRED P. MURRAH, Circuit Judge
Hon. STANLEY N. BARNES, Circuit Judge

[Title Omitted]

PETITION FOR REVIEW OF A DECISION OF THE NATIONAL LABOR RELATIONS BOARD

On consideration of the petition for rehearing filed in the above-titled cause,

IT IS HEREBY ORDERED that the petition for rehearing in the above-titled appeal be and the same is hereby denied.

[3] PROCEEDINGS

HEARING OFFICER: SCHULSON: The hearing will be in order.

This is a formal hearing in the matter of Local Union No. 134, International Brotherhood of Electrical Workers, AFL-CIO and International Telephone and Telegraph Corporation, Communications Equipment and Systems Division and Communications Workers of America, AFL-CIO, Case No. 13-CD-209.

The Hearing Officer for the National Labor Relations Board is Stephen S. Schulson.

* * * *

[22] HEARING OFFICER: At this time I plan to rule on two petitions to revoke subpoenas, one filed by Mr. O'Brien and one filed by Mr. Schur.

I have received IBEW's written response to Mr. O'Brien's petition, but I received no written response to Mr. Schur's petition so at this time I would like Mr. Fitzgerald to give me the IBEW's position on Mr. Schur's petition to revoke subpoenas.

MR. FITZGERALD: Yes.

* * * *

[32] MR. FITZGERALD: If you are talking about 10(b) problems, if the contract is void, then I think your 10(b) problems—if it's void as an existing contract then you don't have a 10(b) problem on date of execution; in other words, the Supreme Court doctrine that 10(b) applies to specific events unless the contract itself is invalid, then you can file a charge in that sense at any time.

Now, if you apply 10(b) to this proceeding, I think that that would be inappropriate only in the sense we have heard representation that this document is going to be introduced as evidence and presumably argued by the Employer and CWA that this is an element.

If not, maybe the only element as far as I know of the [33] claim CWA has for this jurisdiction in Elk Grove and Cook County, I submit that the Board would be abdicating its responsibility if it did not inquire into the validity of the contract submitted and urged as a basis for the jurisdictional claim and I submit further that the references to the determination by the Board in this regard are incorrect and are set out more fully in my answer that in the New York representation petition the Board neither in New York or on appeal in Washington D.C. considered these factors at all and the appeal itself concerned two other issues, one the scope of the unit and

two the fact that the contract was entered into when there was not a representative compliment.

This is different from my point that this is an invalid contract because it violates Section 8(a)(2) because of the application of Section 8(f).

I think this is not been litigated and has to be.

HEARING OFFICER: Are you saying the Union was a minority union when the contract was entered into?

MR. FITZGERALD: As far as we know they had no members claimed by this Employer and I think that this evidence, this information has to be in the record if we are going to, if the Board is going to know that this is a valid contract or invalid as we contend.

HEARING OFFICER: I am going to grant the petition to revoke.

* * * *

[3] TRIAL EXAMINER WILSON: Will the parties please state their appearances, for the record.

MR. SCHULSON: For the General Counsel, Stephen S. Schulson.

* * * *

[5] MR. SCHULSON: I would like at this time, one point that [6] Mr. Fitzgerald raised, it is my understanding that under 102.92 of the Board's rules, the record and the exhibit in the previous 10(k) hearing automatically become part of this proceeding by operation of the rules.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 72-1822

[Title Omitted]

BRIEF FOR PETITIONER UNION LOCAL 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO

STATEMENT OF ISSUES

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1. Did the respondent NLRB violate the Administrative Procedures Act by combining in the same individual employee, the position of hearing officer at the jurisdictional dispute hearing held under § 10(k) of the Act, and the position of prosecutor, as counsel for general counsel, in the unfair labor practice hearing under § 8 of the Act."

2. Did the respondent NLRB violate the basic procedural rights to Due Process of Local 134, by refusing to consider evidence sought by Local 134 concerning the execution of a collective bargaining agreement between the employer, ITT, and another union, CWA, but thereafter relying upon the contract as the primary basis for awarding the work jurisdiction to the CWA?

3. Did the NLRB violate the Due Process rights of Local 134 by issuing its notice of hearing concerning a dispute in Cook County, Illinois, and then permitting evidence to be presented in the hearing concerning practices, beyond both Cook County and the jurisdiction of Local 134, under both an industry practice and an employer practice

which are nationwide in scope, and thereafter relying upon that evidence which was adduced without notice or opportunity to be heard at the hearing by the International Union or other local unions located outside of Cook County, Illinois.

4. Has the NLRB erred on the merits in its jurisdictional decision by ignoring the historical jurisdiction of Local 134 that existed for more than forty years, and by making findings of fact that are contrary to the evidence in the record concerning the similarity of the disputed work with other work historically performed by Local 134, and by ignoring evidence concerning the skill, the efficiency, and the economy of the performance of the work by Local 134's members.

5. Has the N.L.R.B., in its jurisdictional decision and determination of dispute violated its own prior decisions and the Supreme Court decision in *National Woodworkers*, in deciding a jurisdictional question when the respondent union is seeking to retain its historical jurisdiction?

6. Has the NLRB violated the Supreme Court decision in *National Woodworkers*, which holds that the union has a right to retain its basic jurisdiction, by its decision that the Local 134 violated Section 8(b)(4)(D) in seeking to retain its jurisdiction.

7. May the NLRB find that an individual member, who possesses the function of union steward is without the ability to make a personal decision to leave a job site when non-union men are present, without binding the union as its agent for the finding of a violation of Section 8(b)(4) of the Act.

SUPREME COURT OF THE UNITED STATES

No. 73-1313

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION, COMMUNICATIONS EQUIPMENT AND SYSTEMS DIVISION,

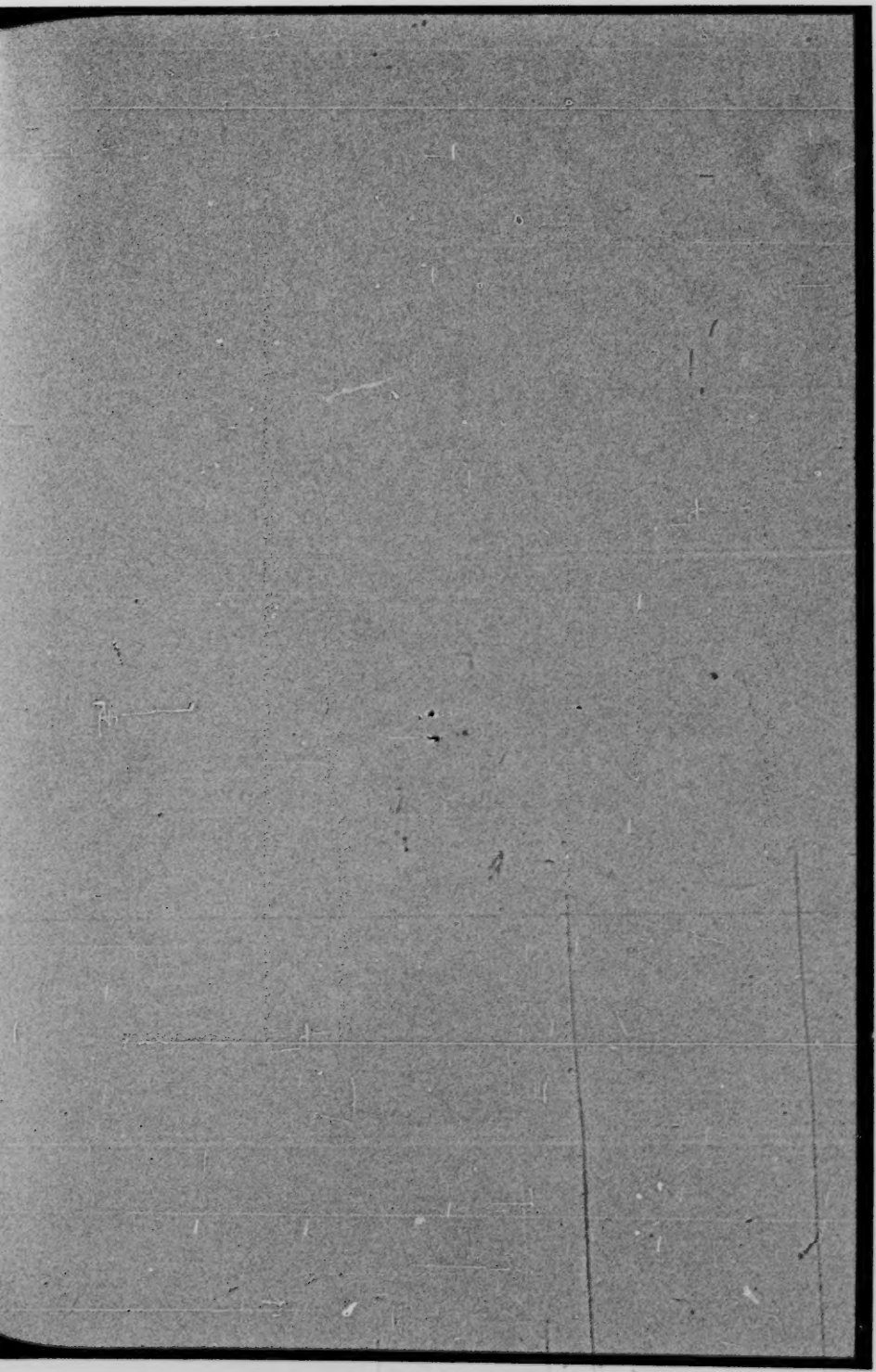
Petitioner,

v.

LOCAL 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO

ORDER ALLOWING CERTIORARI. Filed May 13, 1974.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted.



COURT, U.S.

FEB 25 1974

MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1313

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION, COMMUNICATIONS EQUIPMENT AND SYSTEMS DIVISION,

Petitioner,

v.

LOCAL 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RAYMOND I. GERALDSON
MATTHEW E. MURRAY
JOHN D. O'BRIEN
PETER J. HURTGEN

SEYFARTH, SHAW, FAIRWEATHER & GERALDSON
1819 H Street, N.W.
Washington, D.C. 20006

Attorneys for Petitioner

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No.

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION, COMMUNICATIONS EQUIPMENT AND SYSTEMS DIVISION,

Petitioner,

v.

LOCAL 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioner, International Telephone and Telegraph Corporation, Communications Equipment and Systems Division (hereinafter ITT-CESD), prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported in 486 F. 2d 863. The Decision and Order of the National Labor Relations Board which was reviewed by the Court of Appeals is reported in 197 NLRB No. 127. The Decision and Determination of Dispute of the National Labor Relations Board, which is the Board's determinination of a union jurisdictional dispute, is reported in 191 NLRB No. 122. All three (3) opinions are appended to this petition for a writ of certiorari.

JURISDICTION

The judgment of the Court of Appeals was entered on September 20, 1973. Thereafter, a rehearing was sought which was denied by the Court of Appeals on November 26, 1973. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the Seventh Circuit properly decided that contrary to the National Labor Relations Board's established procedures, that agency must conduct jurisdictional dispute proceedings under §10(k) of the Labor Management Relations Act in accordance with the provisions of the Administrative Procedure Act applicable to adjudications (§554, §556 and §557).

2. Whether the subsequent prosecution of an unfair labor practice case by the same NLRB attorney who presided at the prior §10(k) hearing is an improper commingling of prosecutorial and adjudicative functions proscribed by §554 of the Administrative Procedure Act.

STATUTES AND REGULATIONS INVOLVED

The following sections of the Labor Management Relations Act (L.M.R.A.), 29 U.S.C. §151 *et seq.* are applicable to this case and are appended verbatim to this petition: §8(b)(4)(D), §10(l) and §10(k). The following sections of the Administrative Procedure Act (A.P.A.), 5 U.S.C. §500 *et seq.* are applicable and are appended verbatim: §551(6), §551(7), §554, §556 and §557. Section 101.34 of the National Labor Relations Board's Statements of Procedure, 29 C.F.R. §101.34, is applicable to this case and is appended verbatim.

STATEMENT OF THE CASE

Upon a charge filed by ITT-CESD a hearing was held before a duly designated hearing officer of the National Labor Relations Board (hereinafter designated as "Board") under §10(k) of the Labor Management Relations Act, 29 U.S.C. §160(k), for the purpose of hearing facts concerning competing work jurisdiction claims by Local 134, International Brotherhood of Electrical Workers (hereinafter designated as "Local 134") and the Communications Workers of America (hereinafter designated as "CWA").

The Board issued its Decision and Determination of Dispute on June 30, 1971, wherein it awarded the disputed work to employees of ITT-CESD represented by the CWA, rather than to employees of other employers, represented by Local 134.

Following the refusal of Local 134 to comply with the Board's jurisdictional award, a complaint against local 134 issued, alleging a violation of §8(b)(4)(D) of the L.M.R.A., 29 U.S.C. §158(b)(4)(D), and a hearing was held thereon before an Administrative Law Judge. The

Administrative Law Judge's decision and recommended order was issued on February 7, 1972, finding that Local 134 had violated §8(b)(4)(D). On June 22, 1972, the Board issued its Decision and Order affirming the findings of the Administrative Law Judge.

The attorney for the Board who prosecuted the unfair labor practice case is the same person who presided at the §10(k) hearing.

Upon Local 134's failure to comply with the Board's Decision and Order, the Board petitioned the Court of Appeals for the Seventh Circuit for enforcement of the Board's Order pursuant to 29 U.S.C. §160(e).

On September 20, 1973, the Court of Appeals issued its decision and order denying enforcement of the Board's Decision and Order. The Court of Appeals did not disturb the Board's jurisdictional award but rather found that:

> "Testimony at the §10(k) hearing clearly indicates that employees represented by the CWA customarily install and test equipment similar to that involved here in Cook County and the Board determined that by area, employer, and industry practice, and by skill and training, the CWA employees were more entitled to perform the disputed work than employees of Local 134." (486 F. 2d at 865).

The Court of Appeals also did not disturb the Board's findings and conclusions in the subsequent unfair labor practice proceedings. Specifically, the Court of Appeals held that:

> "[ITT-CESD] . . . was coerced by Local 134 in an attempt to have the work assigned to employees the local represented. In these circumstances the employer was 'trapped' in a jurisdictional dispute between the two contesting unions . . . Such is the

very activity §8(b)(4)(D) was intended to prohibit." (486 F. 2d at 866).

The basis for the Court of Appeals' denial of enforcement of the Board's Order, was that the individual who acted as the hearing officer in the §10(k) proceeding was not an administrative law judge pursuant to 5 U.S.C. §556 and also that the same person later acted as the prosecutor of the unfair labor practice complaint. On these facts the Court of Appeals concluded that there had been a commingling of prosecutorial and adjudicative functions in violation of §554 of the Administrative Procedure Act (A.P.A.), 5 U.S.C. §554.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

I.

THE DECISION OF THE SEVENTH CIRCUIT IS IN DIRECT CONFLICT WITH A DECISION OF THE DISTRICT OF COLUMBIA CIRCUIT.

The decision of the Seventh Circuit for which this writ of certiorari is sought holds that a §10(k) jurisdictional dispute proceeding is an adjudication within the meaning of §554 of the A.P.A. and that the requirements of §554 and other related sections of the A.P.A. are applicable to the conduct of §10(k) proceedings. The Court of Appeals stated that:

"It is apparently admitted that §554 applies to §10(k) hearings."[1]

---

[1] Quite to the contrary, it was not admitted that §554 of the A.P.A. is applicable to §10(k) hearings. ITT-CESD, the Board, and the CWA, all argued extensively in their briefs that §10(k) hearings are not encompassed by any of the provisions of §554, §556 and §557.

Upon this erroneous premise that court continued as follows:

> "And §556 of the Act provides in presently material part that, in hearings required to be conducted in accordance with §554 '. . . [t]here shall preside at the taking of evidence . . . one or more hearing examiners appointed under Section 3105 of the title.' Section 3105 provides in presently material part that hearing examiners '. . . may not perform duties inconsistent with their duties and responsibilities as hearing examiners.' This is, we think, a specific manifestation of the congressional intent that administrative officers who preside at such hearings be completely 'isolated,' 'impartial,' and 'independent'. . .; that there shall be no 'commingling' of the functions of investigation or advocacy with the function of decision making. . . .'It has been said that hearing examiners are the administrative equivalent of federal judges.' Indeed, the title of hearing examiner has recently been changed to 'Administrative Law Judge.' " (486 F. 2d at 867). (citations and footnotes omitted).

The Seventh Circuit's holding that §554 and §556 are applicable to §10(k) proceedings is in direct conflict with the decision of the District of Columbia Circuit in *Bricklayers, Masons and Plasterers, Int'l. Union v. N.L.R.B.*, 475 F. 2d 1316 (CA. D.C., 1973). In *Bricklayers*, the respondent union argued the unenforceability of a Board order based upon a violation of §8(b)(4)(D). It asserted, as was done in the instant case, that the determination of dispute in the §10(k) proceeding had been contrary to §554 because there had been no recommended decision by an administrative law judge. In rejecting this, the District of Columbia Circuit stated:

> ". . . [O]nly if a §10(k) determination is an adjudication within the meaning of §554 would a recom-

mended decision have been required. We hold that a decision in a §10(k) proceeding is not an adjudication within the meaning of 5 U.S.C. §554." (*Id.* at 1318) (footnote omitted).

The District of Columbia Circuit's holding was based, in part, on an examination of the A.P.A. legislative history from which it gleaned the following definition of "adjudication".

"... If the action in question does not lead to a 'final disposition' by the agency, it may not be an adjudication." (*Id.* at 1319) (footnote omitted).

The decisions of the Seventh and District of Columbia Circuits are obviously irreconcilable. Both, however, consider the operative question to be whether the §10(k) proceeding is an adjudication which results in an "order" of the Board. In reaching contrary conclusions on this point, both decisions draw upon this Court's decision in *N.L.R.B. v. Plasterers Union No. 79*, 404 U.S. 116 (1971), specifically the Court's statement that:

"... But the §10(k) decision standing alone, binds no one. No cease and desist order aginst either union or employer results from such a proceeding; the impact of the §10(k) decision is felt in the §8(b)(4)(D) hearing because for all practical purposes the Board's award determines who will prevail in the unfair labor practice proceeding. If the picketing union persists in its conduct despite a §10(k) decision against it, a §8(b)(4)(D) complaint issues and the union will likely be found guilty of an unfair labor practice and be ordered to cease and desist. On the other hand, if that union wins the §10(k) decision and the employer does not comply, the employer's §8(b)(4)(D) case evaporates and the charges filed against the picketing union will be dismissed. Neither the employer nor the employees

to whom he has assigned the work are legally bound to observe the §10(k) decision, but both will lose their §8(b)(4)(D) protection against the picketing which may, as it did here, shut down the job. The employer will be under intense pressure, practically, to conform to the Board's decision. This is the design of the Act; Congress provided no other way to implement the Board's §10(k) decision." (*Id.* at 126-127) (footnote omitted).

The implication drawn from the above-quoted language from *Plasterers* by the District of Columbia Circuit is stated in its decision as follows:

"The scheme for and consequence of a section 10(k) hearing thus are not adjudicatory, notwithstanding that in reaching its determination the Board resolves a factual issue." (475 F. 2d at 1321).

The Seventh Circuit's interpretation of this Court's statement in *Plasterers* is that:

"... It is, we think, an oversimplification to say that the §10(k) hearing has no binding effect. As Justice White put it in ... [Plasterers] ...

'... [T]he impact of the §10(k) decision is felt in the §8(b)(4)(D) hearing because for all practical purposes the Board's award determines who will prevail in the unfair labor practice proceeding. If the picketing union persists in its conduct despite a §10(k) decision against it, a §8(b)(4)(D) complaint issues and the union will likely be found guilty of an unfair labor practice and be ordered to cease and desist. On the other hand, if that union wins the §10(k) decision and the employer does not comply, the employer's §8(b)(4)(D) case evaporates and the charges he filed against the picketing union will be dismissed.' " (486 F. 2d at 867).

Thus, the Seventh Circuit emphasizes the likelihood of unfair labor practice liability resulting to a union after an adverse §10(k) award and has therefore concluded that the §10(k) proceeding is an adjudication. The District of Columbia Circuit, on the other hand, emphasizes the non-binding aspect of the §10(k) award and concludes that it is not an adjudication.

The fact that two (2) courts of appeals have rendered completely contradictory decisions on an important question of law concerning the statutory scheme for the resolution of jurisdictional disputes is reason alone for this Court to grant a writ of certiorari for the purpose of resolving the appellate conflict.

II.

THE DECISION OF THE SEVENTH CIRCUIT PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE DECIDED BY THE SUPREME COURT.

Even if the Seventh Circuit's decision were not in conflict with any other court of appeals decision, the effects of its decision, if allowed to stand, will have such far reaching consequences for the future resolution of jurisdictional disputes that this Court should grant review.

The Seventh Circuit's decision that §10(k) proceedings are adjudications under §554 spawns many more procedural problems than the one it seeks to remedy, i.e., prevention of the same Board attorney from presiding at the §10(k) hearing and later prosecuting the unfair labor practice complaint against the recalcitrant union.[2] If that

[2] Even if the §10(k) proceeding were an adjudication, §554(d) only proscribes the same person participating in the decisional

were the only effect of the Seventh Circuit's holding, the Board could easily comply by simply having a different attorney prosecute the §8(b)(4)(D) complaint.[3]

Far more significant is the Seventh Circuit's holding that the §10(k) hearing must be conducted by an administrative law judge as required by §556; that the administrative law judge must render a recommended decision as required by §554(d) and §557; and that the parties must have the opportunity to submit proposed findings and conclusions before the recommended decision is issued and exceptions to that decision after it is issued as required by §557(c).

Since §10(k) was enacted in 1947, the Board has always construed its mandate to resolve jurisdictional disputes as one which requires the same degree of speed and informality that is attendant with §9 questions concerning representation. Thus, in *Marine Cooks & Stewards (Irwin-Lyons Lumber Co.)*, 83 NLRB 341 (1949), the Board stated:

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aspects of a case after he prosecuted it. In the instant case, the prosecutorial role of the Board's attorney was *subsequent* to the decisional role, if presiding at the §10(k) hearing can be construed as decisional. The Board, of course, does not invest the §10(k) hearing officer with any decisional authority and provides in its Statements of Procedure that "The hearing is nonadversary in character, and the primary interest of the hearing officer is to insure that the record contains as full a statement of the pertinent facts as may be necessary for a determination of the issues by the Board . . . At the close of the hearing, the case is transmitted to the Board for decision. The hearing officer prepares an analysis of the issues and the evidence, but makes no recommendations in regard to resolution of the dispute." (29 C.F.R. §101.34)

[3]In fact, the Board does not ordinarily assign the same person to conduct related §10(k) hearings and §8(b)(4)(D) unfair labor practice cases.

> "The Respondents assert that Section 8 [now §557] of the Administrative Procedure Act applies to a proceeding under Section 10(k) of the National Labor Relations Act, as amended. We do not agree. Under Section 202.32 of the Board's Rules and Regulations–Series 5, as amended, the hearing under Section 10(k) is non-adversary in character, and, according to the procedure adopted therefore, conducted in the same way as a hearing in a representation proceeding. The Board adopted such procedure because the decision in the proceedings under Section 10(k) is a preliminary administrative determination made for the purpose of attempting to resolve a dispute within the meaning of that section; the unfair labor practice itself is litigated at a subsequent hearing before a Trial Examiner in the event the dispute remains unresolved. It is to the subsequent adversary hearing, which leads to a final Board adjudication, that Section 8 of the Administrative Procedure Act applies." (*Id.* at 341)

To the same effect is the Board's holding in *International Longshoremen's & Warehousemen's Union (General Ore, Inc.)*, 124 NLRB 626 (1959).

The Board's long standing interpretation of §10(k) procedure is not without judicial support from courts of appeals and even this Court, as noted by the District of Columbia Circuit's decision in *Bricklayers, supra*, wherein the Court stated:

> "... Furthermore, we are faced with an unusually impressive administrative interpretation supporting the conclusion we reach, first adopted by the Board as long ago as 1949 in National Union of Maritime Cooks and Stewards (Irwin Lyons Lumber Co.), *supra*, repeated in 1959 in Local 8, Longshoremen (General Ore, Inc.), 124 NLRB 626, and until now,

we believe, not questioned by courts or Congress. This interpretation of section 10(k) by the Board is entitled to great weight. United States v. American Trucking Assn., Inc., 310 U.S. 534, 549, 60 S. Ct. 1059, 84 L. Ed. 1345 (1940); Norwegian Nitrogen Products Co. v. United States, 228 U.S. 294, 315, 53 S. Ct. 350, 77 L. Ed. 796 (1933). Cf. United States v. Florida East Coast Ry. Co., *supra*, 410 U.S. 224, 236, N. 6, and dissenting opinion at 246, 93 S. Ct. 810, 35 L. Ed. 2d 223. It is noteworthy also that in neither NLRB v. Plasterers' Union No. 79, *supra*, nor NLRB v. Radio & Television Broadcast Engineers Union No. 1212, 364 U.S. 573, 81 S. Ct. 330, 5 L. Ed. 2d 302, (1961), was there a hearing officer's recommended decision in the section 10(k) proceedings there involved, although, we must add, no question in that respect was raised." (475 F. 2d at 1321) (footnote omitted).

If the Seventh Circuit is correct, the Board must fundamentally change the manner in which it procedurally resolves jurisdictional disputes so as to comply with the provisions of the A.P.A.[4] In doing so, however, an obvious conflict with the statutory scheme for the speedy resolution of jurisdictional disputes is presented. The additional time incurred between the initiation of the Board's §10(k) proceedings and the rendering of its decision will be significant if the case must await

[4] The Board, of course, may refuse to abide by the Court of Appeals' holding but to do so it risks having its jurisdictional awards and subsequent cease and desist orders denied enforcement in the Seventh Circuit unless that court recants and reverses itself in a later case. This is unlikely, however, because the Seventh Circuit denied the Board's, ITT-CESD's, and the CWA's petitions for rehearing in this case.

assignment of an administrative law judge, allow for time to submit proposed findings and conclusions, and file exceptions to the recommended decision of the administrative law judge.

Even more destructive of congressional intent than the lengthening of the time internal to the Board's handling of a jurisdictional dispute, is the potential for drastic delays which may result from the superimposition of the A.P.A.'s definition of "adjudication" and "order" on the Board's §10(k) decision after it finally is rendered. Adjudication is defined in §551(7) of the A.P.A. as "agency process for the formulation of an order." Order is defined in §551(6) as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making . . ."

If the §10(k) proceeding is an adjudication and the jurisdictional award is an "order" rendered by the Board, after a hearing conducted by an administrative law judge, that order must, under §551(6), be a "final order" and therefore may be reviewed by a court of appeals under §10(f) of the L.M.R.A., 29 U.S.C. §160(f).[5] This circumstance would create the anamolous situation of a jurisdictional "order" being enforced or set aside by a court of appeals, after which, if it were enforced, an entirely new adjudication of the unfair labor practice would result with another hearing before an admin-

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[5] That section provides in part that "Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business . . .".

istrative law judge, another "order" of the Board, and, if necessary, another review by a court of appeals. This extraordinary time consuming procedure would, of course, be directly contrary to the Congressional purpose of enacting §10(k) as a short-stop measure to resolve such disputes administratively and thereby prevent a protracted adjudication—or adjudications.

The absurdity of a court of appeals reviewing a jurisdictional "order" before any order or finding concerning the commission of an unfair labor practice, merely serves as an indication of the incompatability of the Seventh Circuit's imposition of the A.P.A.'s provisions on the L.M.R.A.'s procedures for the resolution of jurisdictional disputes. Congress certainly did not consciously intend to marry the two (2) statutes in the manner required by the Seventh Circuit's decision.

The District of Columbia Circuit was obviously conscious of the congressional intent to avoid the delay which would be occasioned by converting the §10(k) proceeding into an "adjudication" and accordingly stated as follows:

> ". . . In the first place there is need, obviously, for as expeditious a resolution of the jurisdictional dispute as is reasonably possible. We must also give consideration to the deep-seated concern Congress had with delays caused by judicial intervention in representation cases in pre-Wagner Act days. See American Federation of Labor v. NLRB, *supra*." (475 F. 2d at 1321).

CONCLUSION

The protections embodied in the A.P.A. must be reconciled with the federal labor policy set forth in the L.M.R.A. for the resolution of jurisdictional disputes in a manner which preserves to each the essential purposes for its enactment. It is submitted that the Seventh Circuit's decision totally emasculates the purpose for which §10(k) was enacted while the District of Columbia Circuit's sharply contrasting decision properly construes both statutes so as to preserve the essential purposes of each. The decision below is an appropriate vehicle upon which this Court should invoke its jurisdiction because that decision not only presents a fundamental question of statutory construction, it has also created a serious impediment to the Board's ability to effectively resolve jurisdictional disputes.

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

MATTHEW E. MURRAY
JOHN D. O'BRIEN
PETER J. HURTGEN
1819 H Street, N.W.
Washington, D.C. 20006
Attorneys for Petitioner

APPENDIX A

In the
United States Court of Appeals
for the Seventh Circuit
486 F.2d 863 (1973)

September Term, 1972—April Session, 1973

No. 72-1822
Local 134, International Brotherhood of Electrical Workers, AFL-CIO,
Petitioner,
v.
*National Labor Relations Board,
Respondent.

National Labor Relations Board

Argued April 18, 1973—Decided September 20, 1973

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864 Before Swygert, *Chief Judge,* Murrah* and Barnes,** *Circuit Judges.*

Murrah, *Circuit Judge.* This is an appeal by a labor union from an order of the National Labor Relations Board (the Board) finding that the union had committed a § 8(b)(4)(D) unfair labor practice in a jurisdictional dispute over installation of telephone equipment. The

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*Senior Judge Alfred P. Murrah of the United States Court of Appeals for the Tenth Circuit sitting by designation.

**Senior Judge Stanley N. Barnes of the United States Court of Appeals for the Ninth Circuit sitting by designation.

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*13-CD-209; 197 NLRB No. 127

dispute arose in this way. The Communications Equipment and Systems Division of International Telephone & Telegraph Corporation (the Company) contracted with the Village of Elk Grove, Illinois, to sell, install, test, and maintain a private telephone system for the Elk Grove Village Firehouse and City Administration Offices. This work involved two stages, (1) "pulling cable," *i.e.*, routing the telephone cable to the telephone instruments, and (2) "terminating the cable," that is installing and testing the Private Branch Exchange (PBX) switch system and telephone instruments. The Company subcontracted the "pulling cable" phase to the C. A. Riley Electric Construction Co., whose employees are represented by Local 134, International Brotherhood of Electrical Workers, AFL-CIO (Local 134); the terminating phase was to be accomplished by Company technicians represented by the Communication Workers of America (CWA).

The Local 134 business agent objected to this work assignment, telling Company officials that Local 134 did all telephone and PBX installation and maintenance work in that area, that CWA would not install telephone equipment in Cook County, and that "[w]e'd better get that work or there will be trouble."

When CWA technicians appeared at the job site to begin their assigned work, the Local 134 steward announced to his fellow workers either, "I can't work here" or "we can't work here."[1] He and the other Local 134 employees subsequently left the job site, and none returned until the Company agreed that no CWA employees would be on the site. When the Local 134

[1] There is some conflict in the evidence as to his exact words, but the difference is not material.

employees had finished "pulling" the cable, the CWA workers returned and completed the "terminating" phase.

The Company then filed a charge alleging that Local
865 134 had violated §§ 8(b)(4)(i) and (ii)(D) of the National Labor Relations Act, 29 U.S.C. §§ 158(b)(4)(i) and (ii)(D), which provide in presently material part that it shall be an unfair labor practice for a labor union or its agents to induce or encourage and employee.

> "(i) . . . to engage in . . . a refusal in the course of his employment to . . . perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is
>
> * * * * *
>
> "(D) Forcing or requiring any employer to assign particular work to employees in a particular labor organization . . . rather than to employees in another labor organization. . . ."

A hearing on the charge, conducted by a hearing officer in accordance with the provisions of § 10(k) of the Act, 29 U.S.C. § 160(k),[2] resulted in a finding that

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[2] Section 10(k), 29 U.S.C. § 160(k), provides that

"[w]henever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practices shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed."

employees represented by Local 134 were not entitled to the disputed work assignment, and that Local 134 was therefore not entitled to attempt to coerce or force the Company to assign the disputed work to its members. When Local 134 informed the Board's Regional Director of its decision not to acquiesce in the Board's determination, the Regional Director issued this unfair labor practice complaint. Upon a §10(b) hearing, 29 U.S.C. §160(b), the Board adopted the §10(k) findings, and accordingly determined that Local 134 had committed a §8(b)(4)(D) unfair labor practice.

In this §10(e) enforcement proceeding, Local 134 takes the position that all of the installation work involved here has customarily been performed by Local 134 and, relying upon Longshoremen and Warehousemen's Local 8 (Waterway Terminals Co.), 185 NLRB No. 35, and the rationale in Woodwork Manufacturers v. NLRB, 386 U.S. 612 (1967), contends that the Board erroneously found in the §10(k) proceeding that the work should be awarded to CWA. In the *Waterway Terminals* and other referenced cases the Board, recognizing the concept of customary work assignments, held that §8(b)(4)(D) was not designed to proscribe union attempts to retrieve the jobs of employees whom the employer had supplanted by reallocating their work to others. Contrary, however, to the position of the union, we do not have a customary work assignment case in which work is usurped from workers of one union by reallocation to workers of another union. Testimony at the §10(k) hearing clearly indicates that employees represented by CWA customarily install and test equipment similar to that involved here in Cook County, and the Board determined that by area, employer, and

industry practice and by skill and training, the CWA employees were more entitled to perform the disputed work than employeees of Local 134.

In the *Woodwork Manufacturers* case a trade association filed a § 8(b)(4)(B) charge, claiming that it was an unfair labor practice for carpenters to refuse to handle pre-cut and pre-fitted doors manufactrued by a member of the association. The NLRB dismissed this particular charge (149 NLRB 646), and the Court of Appeals affirmed (354 F.2d 594, 599 (7th Cir. 1965)). The Supreme Court also affirmed, based upon the Board's
866 specific findings to the effect that the union's conduct involved only a primary contract dispute with the employer over preservation of job-site work customarily performed by the contracting union, rather than a secondary jurisdictional dispute between two unions, and was therefore not prohibited by § 8(b)(4). The court concluded that, viewed as a whole, § 8(b)(4) was manifestly intended to protect genuinely neutral employers from coercive pressures in disputes not their own; and rationalized that "[t]he prohibition of subsection (D) against coercion to force an employer to assign certain work to one of two unions contesting for it protects the employer trapped between the two claims." 386 U.S. at 625. In both *Woodwork Manufacturers* and *Waterway Terminals* the Board and the courts were concerned with the concept of customary work assignments, and simply applied that doctrine to exempt the disputes from the prohibitions of § 8(b)(4).

The insurmountable difficulty confronting the union here is that the salient and controlling facts of its case do not fit the facts of the cases upon which it relies. In our case the Company is a party to a collective bargaining agreement with CWA, covering installation operations, pursuant to which the work in question was assigned to

CWA. At the § 10(k) hearing it was concluded that "considerations of collective-bargaining history and agreements favor assignment of the work to employees represented by CWA." Unlike the circumstances of *Woodwork Manufacturers* and *Waterway Terminals*, then, the Company assigned the work to CWA in accordance with a current collective bargaining agreement, but was coerced by Local 134 in an attempt to have the work assigned to employees the Local represents. In these circumstances the employer was "trapped" in a jurisdictional dispute between the two contesting unions. Stated another way, the Local 134 activities complained of did not involve a primary dispute with the employer over fulfillment of its contract for work customarily performed, but were secondary pressures designed to influence the employer concerning a jurisdictional union dispute. Such is the very activity § 8(b)(4)(D) was intended to prohibit. 386 U.S. at 625. *See also National Labor Relations Board v. Local Union No. 9*, 255 F.2d 649 (4th Cir. 1958). We certainly cannot say that the Board's decision was not supported by the controlling facts of the case. *See, e.g., NLRB v. Akin Products Co.*, 209 F.2d 109 (5th Cir. 1953).

Compliance With the Requirements of the Administrative Procedure Act

Local 134 also contends that the Board violated Section 5 of the Administrative Procedure Act, 5 U.S.C. § 554, because the hearing officer in the § 10(k) proceeding subsequently served in a prosecutorial capacity as counsel for the General Counsel at the § 8 Unfair Labor Practice Hearing. Section 554 provides in presently material part that "[a]n employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually

related case, participate or advise in the decision, recommended decision, or agency review. . . ." The avowed purpose of this provision of the Act is to ". . . curtail and change the practice of embodying in one person . . . the duties of prosecutor and judge." *See Wong Yang Sung v. McGrath*, 339 U.S. 33, 41 (1950). *See also Riss & Co., Inc. v. United States*, 341 U.S. 907 (1951). And it is true that in this case the presiding § 10(k) hearing officer also acted as a prosecutor at the Unfair Labor Practice Hearing.

In the Board's view it was not improper for the same person to perform the functions of hearing officer and subsequently prosecute an unfair labor charge based upon the evidence adduced at that hearing, simply because the hearing was without binding effect on anyone. While this
867 is technically so, it is also true that the hearing officer's rulings at the § 10(k) hearing largely determine what evidence the Board will have to consider at the Unfair Labor Practice Hearing, in which the hearing officer participates as an advocate. It is, we think, an oversimplification to say that the § 10(k) hearing has no binding effect. As Justice White put in in *NLRB v. Plasterers' Union*, 404 U.S. 116, 126-127 (1971),

> ". . . the impact of the § 10(k) decision is felt in the § 8(b)(4)(D) hearing because for all practical purposes the Board's award determines who will prevail in the unfair labor practice proceeding. If the picketing union persists in its conduct despite a § 10(k) decision against it, a § 8(b)(4)(D) complaint issues and the union will likely be found guilty of an unfair labor practice and be ordered to cease and desist. On the other hand, if that union wins the § 10(k) decision and the employer does not comply, the employer's § 8(b)(4)(D) case evaporates and the charges he filed against the picketing union will be dismissed."

APPENDIX B

197 NLRB No. 127 D–6358
Chicago, Ill.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

LOCAL NO. 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO

and Case 13–CD–209

INTERNATIONAL TELEPHONE & TELEGRAPH CORPORATION, COMMUNICATIONS EQUIPMENT & SYSTEMS DIVISION

DECISION AND ORDER

On February 7, 1972, Trial Examiner Thomas S. Wilson issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief;[1] the Employer filed an answering brief, cross-exceptions, and a supporting brief; and the Intervenor, Communications Workers of America, AFL-CIO, filed a brief in support of the decision of the Trial Examiner.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

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[1] Attached to Respondent's brief were copies of the briefs it filed with the Board following the 10(k) hearing and its motion for reconsideration of our Decision and Determination of Dispute issued thereafter (191 NLRB No. 122).

The Board has considered the record[2] and the Trial Examiner's Decision in light of the exceptions and briefs and has decided to affirm the Trial Examiner's rulings, findings, and conclusions and to adopt his recommended Order, with the modifications set forth below.

As more fully set forth in his Decision, the Trial Examiner found that shortly after the ITT employees arrived at the jobsite Respondent's steward, Becker, checked their union cards in the presence of other employee-members of Respondent and immediately announced either "I can't work here" or "We can't work here." However, he did not leave then, but shortly thereafter joined the foreman and other employees of Charles Johnson Electric Company, all of whom are represented by Respondent, for coffee.[3] During the conversation, Becker informed the other employees that one of the ITT technicians had a CWA card while the other showed no card. At the end of the coffee break, Steward Becker announced to the assembled employees, "I am leaving because I do not care to work with nonunion men." He thereupon left the jobsite and the other Johnson employees left after him.

It is clear from the totality of Steward Becker's conduct that he was not acting as an individual when he announced in advance his action to the assembled Johnson employees. He was acting in his role as steward

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[2] Respondent's request for oral argument is denied as, in our opinion, the record and the exceptions, cross-exceptions, and briefs adequately present the issues and the positions of the parties.

[3] Contrary to the Trial Examiner's finding that members of Respondent employed by Illinois Bell Telephone Company and C.A. Riley Electrical Construction Company were also present at this coffee break, the record shows that only Johnson's employees and foreman were present.

when he inspected the union cards of the ITT employees and immediately made the statement referred to above. Rather than leaving the jobsite at that point, he joined the assembled Johnson employees for coffee. We can only infer that he did so to be certain that those employees were aware of the presence of the CWA members. It is apparent that his announcements of his findings regarding the union cards of the ITT employees and the action he was taking were a clear signal designed to "induce or encourage" the assembled Johnson employees to leave the jobsite as well.

We agree with the Trial Examiner that Respondent, by the above conduct of its steward, Becker, violated Section 8(b)(4)(i) of the Act. However, we base our finding on the fact that Steward Becker's conduct was directed at the employees of Johnson, not of, Riley. Contrary to the Trial Examiner, we are satisfied that the status of Johnson and Illinois Bell was in issue. The record fully establishes, and we find, that Riley, Johnson, and Illinois Bell, the secondary persons herein, are engaged "in an industry affecting commerce" within the meaning of 8(b)(4).[4] Accordingly, we shall modify the recommended Order to reflect our findings herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the recommended Order of the Trial Examiner, as herein modified, and orders that Respondent, Local No. 134, International Brotherhood

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[4] *Sheet Metal Workers International Association, Local Union No. 299, AFL-CIO (S.M. Kisner and Sons),* 131 NLRB 1196, 1199.

of Electrical Workers, AFL-CIO, Chicago, Illinois, its officers, agents, and representatives, shall take the action set forth in the Trial Examiner's recommended Order, as so modified:

1. Delete from paragraph 1(a) "C. A. Riley Electrical Construction Company" and substitute therefor "Charles Johnson Electric Company."

2. Delete from paragraph 2(b) "C.A. Riley Electric Construction Company" and substitute therefor "Charles Johnson Electric Company."

3. Substitute the attached notice for the Trial Examiner's notice.

Dated, Washington, D.C. June 22, 1972.

John H. Fanning, Member
Ralph E. Kennedy, Member
John A. Penello, Member
NATIONAL LABOR
RELATIONS BOARD

(SEAL)

APPENDIX

NOTICE TO MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT engage in, or induce or encourage any individual employed by Charles Johnson Electric Company, or by any other person engaged in commerce or in an industry affecting commerce, to engage in, a strike or a refusal in the course of his employment, to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services; or threaten, coerce or restrain any other employer or person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is to force and require ITT-CESD to assign the work described below to employees who are members of or represented by Respondent rather than to employees of ITT-CESD, currently represented by Communication Workers of America. The work involved consists of:

Terminating the cable and installing telephone instruments in Cook County, Illinois.

LOCAL NO. 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO

(Labor Organization)

Dated _____ By _____

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Everett McKinley Dirksen Building, Room 881, 219 South Dearborn Street, Chicago, Illinois 60604, Telephone 312-353-7572.

TXD-70-72
Chicago, Ill.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D.C.

LOCAL NO. 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO

and

INTERNATIONAL TELEPHONE & TELEGRAPH CORPORATION, COMMUNICATIONS EQUIPMENT & SYSTEMS DIVISION

Stephen S. Schulson, Esq., for the General Counsel.
John D. O'Brien, Esq., of Chicago, Ill., for the Charging Party.
Robert E. Fitzgerald, Jr., Esq., of Chicago, Ill., for Respondent I.B.E.W.
Jerome Schur, Esq., of Chicago, Ill., for the Intervener C.W.A.

TRIAL EXAMINER'S DECISION

Statement of the Case

Before THOMAS S. WILSON, Trial Examiner: Upon a charge duly filed on December 3, 1970, by International Telephone & Telegraph Corporation, Communications Equipment & Systems Division, herein referred to as ITT-CESD, the General Counsel of the National Labor Relations Board, herein referred to as the General

Counsel[1] and the Board, respectively, by the Regional Director for Region 13 (Chicago, Ill.) issued its complaint dated September 10, 1971 against Local No. 134, International Brotherhood of Electrical Workers, AFL-CIO, herein referred to as Local 134 or Respondent.

The complaint alleged that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(b)(4)(i)(ii)(D) and Section 2(6) and (7) of the Labor Management Relations Act, 1947, as amended, herein referred to as the Act.

Respondent duly filed its answer admitting certain allegations of the complaint but denying the commission of any unfair labor practices.

Pursuant to notice, a hearing was held in Chicago, Illinois, on November 4, 1971 before me. All parties, including Communications Workers of America, herein CWA, who were permitted to intervene, appeared at the hearing, were represented by counsel, and were afforded full opportunity to be heard, to produce and cross examine witnesses, and to introduce evidence material and pertinent to the issues. At the conclusion of the hearing oral argument was waived. Briefs were received from General Counsel, Respondent, ITT-CESD and CWA on November 29, 1971.

Upon the entire record in the case and from my observation of the witnesses, I make the following:

Findings of Fact

I. Business of Respondent

The complaint alleged, the answer admitted and accordingly I find:

[1] This term specifically includes the attorney appearing for the General Counsel at the hearing.

ITT-CESD is engaged in the distribution and installation of electronic telephone equipment and related products with facilities in the States of Connecticut, Illinois, Tennessee, New York, New Jersey, California, Florida and other states. During the past calendar year, ITT-CESD, in the normal course in conduct of its operations, has received goods and materials valued in excess of $100,000 which was shipped to its facilities directly across the state lines.

ITT-CESD is an employer within the meaning of Section 2(6) and (7) of the Act and is a person engaged in commerce or in an industry affecting commerce within the meaning of the Act.

II. The Labor Organizations

Local No. 134, International Brotherhood of Electrical Workers, AFL-CIO and Communications Workers of America, AFL-CIO, are labor organizations within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *The Facts*

On August 27, 1970, ITT-CESD entered into a contract with the Village of Elk Grove, located in Cook County, Illinois, whereby ITT-CESD agreed to install and maintain for 1 year one of its PBX telephone systems in the new Administration Building of the Village of Elk Grove. On November 10, 1970, ITT-CESD subcontracted the necessary cable pulling work in connection with such contract to C.A. Riley Electric Construction Company whose employees were represented by Local 134. During all times materials herein, employees of Charles Johnson Electric Company and Illinois Bell Telephone Company

were also working in the new Administration Building. The employees of both these companies were also represented by Local 134.

On November 10, 1970 Lester Fulton, ITT-CESD supervisor of Maintenance and Installation of PBX Systems, met with C.A. Riley, president of C.A. Riley Electric Construction Company, who inquired as to who was going to do the cable termination and hanging of instrument work on the PBX system. Like a good businessman Riley wanted that work. Fulton answered that ITT-CESD would do that work with its own employees known as Communications Technicians, who, he informed Riley, were represented by CWA. Riley told Fulton that he, Riley, wanted to do the work and suggested that Fulton had best meet with Burton Van Wettering, a business agent for Local 134.

So the next day, November 11, Fulton met Van Wettering in Riley's office where, before excusing himself, Riley informed Van Wettering that ITT-CESD intended to do the terminal work on the PBX system with its own employees who were represented by CWA. Van Wettering then launched into a discussion of various union problems which had arisen and had been solved. He spent some 20 minutes over a problem the labor unions anticipated would arise with a project Leavitt and Son had in Cook County but which never arose due to prior discussions with the unions. Van Wettering told Fulton that the Cook County Building Trades knew that Leavitt and Son had built Leavittown, Pennsylvania, with nonunion help and so were prepared to "stop" Leavitt and Son on their project in Cook County if Leavitt and Son had tried to build that project with nonunion help. He told Fulton that at a pre-building meeting Leavitt and Sons decided to use union help so that the Cook County project proceeded unhampered. Lest the point be dis-

missed, Van Wettering brought out the fact that Leavitt and Son was also a subsidiary of ITT so that ITT-CESD was in the same category as Leavitt and Son. Van Wettering ended the conversation with a flat statement that CWA was not recognized in Cook County and that CWA would install no telephone equipment in Cook County.

On November 30, 1970 Joe Dale Foster, ITT-CESD Director of Labor Relations, met with Van Wettering at the Holiday Inn in Elk Grove Village and asked Van Wettering if he had any questions regarding the PBX job in the Administration Building of the Village. Van Wettering stated that Local 134 installed all telephone and PBX equipment in Cook County, Illinois, along with the maintenance work thereon. Foster reminded Van Wettering that ITT-CESD had subcontracted the cable pulling work at the Administration Building to Riley as they had in New York City and in Los Angeles and asked why he could not accept that. Foster also explained that ITT-CESD had a nationwide contract with CWA covering the installation employees. Van Wettering's answer was that CWA did not do telephone work in Cook County, that to allow that would be to recognize CWA which only had some clerical employees in Cook County. Van Wettering then reiterated his story about the Leavitt and Son's project in Cook County, that the Building Trades were prepared to "stop the job" if Leavitt and Son had attempted to build the project with nonunion help but that, to their surprise, Leavitt and Son had decided at a pre-job conference to do the job with union help. As the men shook hands at parting, Foster said that he hoped there would be no hard feelings if Van Wettering did not get the PBX work. To this Van Wettering answered: "We'd better get that work or there will be trouble." He asked that Foster contact his superiors and then let Van Wettering know their decision.

About 9:15 p.m. on December 2, 1970 Foster telephoned Van Wettering and told him that ITT-CESD was going to do the PBX work in the Administration Building with its own employees beginning the next morning. Promptly after the receipt of this telephone call, Van Wettering telephoned the Local 134 business manager at his home and informed him that CWA men would work on the PBX job the next day. The business manager ordered Van Wettering to go to the jobsite the next day to see if CWA employees were in fact working there.

Van Wettering testified that, as ordered, he was at the jobsite the following morning about 8 o'clock. Before leaving shortly thereafter he testified he spoke to no one except to say "Hello" to Robert Becker, the steward for Local 134 on that job.

About 10:15 a.m. that day Fulton arrived at the Administration Building with Communication Technicians Louis Rodriguez and Dennis Satriano, who are headquartered in New York City. As they entered the telephone room in the basement of the building where their work was to begin, there were already two employees of Illinois Bell present and already at work. One of these two employees, known in this record only as "Bart," immediately upon their entry announced that "if they are working here I am leaving" and began packing up his tools preparatory to departure as did the other Bell Telephone employee. A minute or two later steward Becker entered the telephone room, showed his Local 134 card to Fulton and asked to see the cards of Rodriguez and Satriano. Rodriguez showed Becker his CWA card but Satriano had no card to show.[2] Becker

[2] Becker testified that Satriano merely shrugged his shoulders as though he did not understand English while Fulton testified that Satriano explained in good English, which he spoke, according to

immediately announced to those present that either "I can't work here" or "we can't work here."[3] After this comment Becker and the four or five other employees of Johnson Electric drifted away.

Becker remained on the job for a few minutes until it was time to have a coffee break with the rest of the employees from Local 134 and Jack Schutten, superintendent for Johnson Electric on the job. During this coffee break, Becker was asked about the two ITT-CESD employees and answered that one of them had a CWA card while the other showed no card. At the end of the coffee break Becker told the assembled Local 134 employees that he was going home because he did not want to work with "nonunion men." He thereupon departed for home. The other Local 134 employees also left the jobsite. From home Becker telephoned the union office and left word for the business manager that "there were nonunion men on the job."

No Local 134 employees worked in the Administration Building for the rest of the day.

That afternoon George Coney, Director of Finance for the Village of Elk Grove, invited Harold George, Regional Sales Manager for ITT-CESD, who happened to be in the telephone room at the time with the Communications Technicians, to come upstairs. As George entered the

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Fulton, that he had forgotten to bring his card from New York. If this difference were material, I would credit the testimony of Fulton.

[3]In his oral testimony Fulton testified that Becker used the plural whereas his affidavit puts the phrase in the singular. According to Becker, after seeing Rodriguez' CWA card and having Satriano "shrug his shoulders," he merely thanked him and left the room.

room Coney was talking to one Turnberg, superintendent for the General Contractor on the construction of the Administration Building. Coney asked Turnberg if the job would be completed. Turnberg answered that he could not complete the job if CWA was on the job. Thereupon Coney turned to George and asked if it would be possible not to have CWA on the job the following morning. George stated that it would be possible if Coney made a formal request. Coney made the formal request and George agreed that CWA would not be on the job the next morning. Coney thereupon turned to Turnberg and told him that CWA would not be on the job the next day. Turnberg then dialed a number on the telephone and reported to someone that CWA would not be on the job the next morning.

Late that afternoon Contractor Johnson of Johnson Electric telephoned Becker and informed him that he "could go back to work there, that these other fellows weren't going to be there." Accordingly Becker returned to work on the morning of December 4. All the other Local 134 employees also returned to work that day.

The ITT-CESD technicians did not return to work until December 21 and thereafter completed their work on the PBX system. The Johnson Electric and Riley Electric employees had completed their work in the Administration Building by December 21.

On the afternoon of December 3, 1970, ITT-CESD through its attorney filed the charge in this case alleging that Local Union No. 134, International Brotherhood of Electrical Workers, AFL-CIO, had violated Section 8(b)(4)(i) and (ii)(D) of the Act by engaging in certain proscribed activity with an object of forcing or requiring ITT-CESD to assign the work in dispute to members of Local 134 rather than to employees of ITT-CESD represented by Communications Workers of America, AFL-CIO.

A hearing on this dispute was held in Chicago, Illinois, before Hearing Officer Stephen S. Schulson on March 12, 15 and 17, 1971.

On June 30, 1971 the Board, finding that it was satisfied "that there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred," proceeded to determine the merits of the dispute and made the following specific determination of the dispute as follows:

1. Employees of International Telephone & Telegraph Corporation, Communications Equipment & Systems Division, who are currently represented by Communications Workers of America, AFL-CIO, are entitled to perform the work of terminating the cable and installing telephone instruments in Cook County, Illinois.

2. Local Union No. 134, International Brotherhood of Electrical Workers, AFL-CIO, is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force or require International Telephone & Telegraph Corporation, Communications Equipment & Systems Division, to assign the above work to individuals represented by Local Union No. 134, International Brotherhood of Electrical Workers, AFL-CIO.[4]

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[4] Respondent Union ends the first section of its brief as follows:

> Local 134 urges the Trial Examiner to recommend to the Board that it reconsider the previous decision [Decision and Determination of Dispute, 191 NLRB No. 132] because it was in error to have issued that decision in conflict with the above-cited authorities.

The short answer to this is, of course, that, as a Trial Examiner of the National Labor Relations Board, I enjoy no appellate jurisdiction over the actions of that Board but, on the contrary, am bound by the decisions of that Board.

On August 30, 1971, Local 134 admittedly informed the Regional Director of the Thirteenth Region that Local 134 did not intend to comply with the Board's aforementioned determination of dispute.

B. *Conclusions*

The evidence here proves and I, therefore, find that:

1. On November 11, 1970[5] and again on November 30, 1970, Union Agent Burton Van Wettering threatened, coerced and restrained two separate agents of ITT-CESD by warning that, unless ITT-CESD assigned the remaining PBX work of terminating cables and hanging instruments for the PBX system which ITT-CESD had contracted to install and maintain in the Administration Building of the Village of Elk Grove to members of Local 134 instead of to members of CWA, the work in the Administration Building and on that system would be "stopped."

In the conversation on November 11 this threat, while not stated in so many words, was made explicitly during Van Wettering's 20-minute harangue about how the Cook County Building Trades Council had decided "to stop" a Leavitt and Son project in Cook County unless Leavitt and Son decided to use union labor in the construction of the project instead of the nonunion labor which Leavitt and Son had used on its Leavittown project in Pennsylvania. This threat was explicit enough during his 20-minute lecture but Van Wettering left nothing to chance when he pointed out that Leavitt and Son was, like

[5] Despite Respondent's objection voiced for the first time in its brief, I use the events of this date although, as stated in the brief, the date was not alleged in the complaint because, despite that omission in the complaint, the conversation here found was fully litigated at the hearing.

ITT-CESD, an affiliate of ITT so that the two organizations were in exactly the "same category." The threat to shut down the Elk Grove administration project was implicit in everything Van Wettering had to say on November 11. A man need not be hit over the head to know that he is being threatened and coerced.

On November 30 Van Wettering went through this same 20-minute threatening harangue to another agent of ITT-CESD as to what would happen unless ITT-CESD assigned the remaining PBX work in the Village Administration Building to members of Local 134 instead of to ITT-CESD's own employees who were members of the CWA. On this second occasion, apparently bewildered that his first threats and coercion had proved unsuccessful, Van Wettering made the threat explicit by ending the conversation with the statement that, unless ITT-CESD assigned the remaining work on the PBX system to members of Local 134 "there will be trouble." This time Van Wettering was leaving nothing to chance.[6]

After Van Wettering's threats and coercion were proved unavailing as indicated by the telephone call of 9:30 p.m. to him on December 2 that ITT-CESD was assigning the work to its own employees, Van Wettering's prophecy was fulfilled on December 3 at the exact time that the ITT-CESD communications technicians began

[6] Respondent relies upon the denial by Van Wettering that he ever made the "there will be trouble" statement—which was the only element in either conversation which Van Wettering denied. The threat was there whether or not Van Wettering uttered the disputed words. These words merely made explicit what might be said to have been perfectly implicit theretofor. I have no doubt that Van Wettering on the second occasion became explicit. That was the purpose of the conversation.

work in the Administration Building. This stoppage by Local 134 hardly appears to have been a mere coincidence.

Upon the anticipated arrival of the ITT employees, the Local 134 steward, Thomas Becker, promptly checked the cards of the two technicians and found one with a CWA card and that the other had forgotten his card in New York City. Becker, knowing full well what the ITT-CESD technicians were on the premises due to his inspection of the work to be done, promptly stated "I am leaving because I do not care to work with nonunion men."[7]

Despite this statement, however, Steward Becker did not immediately depart the premises as promised but carefully waited until after he had had coffee with all the other Local 134 employees on the job, employees of Johnson, Illinois Bell, and also of Riley. At the end of coffee and after explaining that one ITT-CESD technician had a CWA card and the other none, Steward Becker announced to that assembly that he was leaving because he did not care to work with "nonunion men."[8] By this statement and by his action, Steward Becker at least sought to, and did, induce and encourage the other Local 134 members employed by Riley Electric "to refuse to perform any service" in the course of their employment. The encouragement was sufficient so that all Local 134 members left the premises at or about this time.[9]

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[7]It is to be noted here that Becker, despite this statement, knew that Rodriguez, at least, was a union man, albeit a member of CWA.

[8]This plural is Becker's.

[9]I include only the employees of Riley Electric Company in this for the technical—but unrealistic—reason that neither Johnson Electric nor Illinois Bell were alleged, or proved, to be "persons

Van Wettering's conversations with the ITT agents made the object of his and Becker's actions so clear that no discussion of that is here required. Local 134 was going to do the ITT CESD PBX work in Cook County instead of the CWA employees or else the work in the Administration Building would be "stopped." This is prohibited by Section 8(b)(4)(D) of the Act.

Hence we have an agent of a labor organization, Steward Becker, inducing and encouraging employees of a person engaged in commerce and in an industry affecting commerce to refuse in the course of their employment to perform any services for the purposes of forcing or requiring an employer, ITT-CESD, to assign work in members of Local 134 instead of to employees represented by CWA which is a violation of Section 8(b)(4)(i)(D) of the Act.

Then we have an agent of a labor organization, Business Agent Van Wettering, threatening and coercing a person admittedly engaged in commerce or in an industry affecting commerce, ITT-CESD, with the object of forcing that employer to assign particular work, the PBX system work in the Administration Building of the Village of Elk Grove, to Local 134 members instead of to employees of ITT-CESD who happen to be members of CWA which is a violation of Section 8(b)(4)(ii)(D) of the Act.

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engaged in commerce or in an industry affecting commerce" and hence the employees of these two employers do not fit the description of Section 8(b)(4)(i). The employees of Riley, on the other hand, were engaged in work subcontracted from ITT-CESD which was admittedly an employer described in that section of the Act and hence Riley's employees would necessarily fit within Section 8(b)(4)(i) of the Act.

IV. The Effect of the Unfair Labor Practices upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with the operations of ITT-CESD described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

The Remedy

Having found that Respondent has engaged in unfair labor practices proscribed by Section 8(b)(4)(i) and (ii)(D) of the Act I shall recommend that it cease and desist therefrom and take certain affirmative action designed to remedy the unfair labor practices of this nature.

Conclusions of Law

1. International Telephone & Telegraph Corporation, Communications Equipment & Systems Division and C.A. Riley Electric Construction C. are engaged in commerce or in an industry affecting commerce within the meaning of the Act.

2. Local 134, International Brotherhood of Electrical Workers, AFL-CIO, and Communication Workers of America, AFL-CIO, are labor organizations within the meaning of the Act.

3. Local 134 has failed and refused to comply with the Board's Decision and Determination of Dispute dated June 30, 1971 [191 NLRB No. 122].

4. Respondent, by threatening ITT-CESD and inducing and encouraging employees of an employer

engaged in commerce to engage in a strike or a refusal in the course of his employment to perform any services for the purpose of forcing or requiring ITT-CESD to assign particular work to members of Local 134 rather than to ITT employees, represented by CWA, has engaged in unfair labor practices within the meaning of Section 8(b)(4)(i) and (ii)(D) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[10]

RECOMMENDED ORDER

Upon the foregoing findings of fact and conclusions of law, and upon the entire record in this case, I recommend that the Respondent, Local No. 134, International Board of Electrical Workers, AFL-CIO, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Engaging in, or inducing or encouraging any individual employed by C.A. Riley Electrical Construction Company, or by any other person engaged in commerce or in an industry affecting commerce, to engage in, a strike or a refusal in the course of his

[10]In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services; or threatening, coercing, or restraining ITT-CESD, or any other employer or person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is to force or require ITT-CESD to assign the work described below to employees who are members of or represented by Respondent rather than to employees of ITT-CESD currently represented by CWA.

The work involved consists of:

Terminating the cable and installing telephone instruments in Cook County, Illinois.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Post in conspicuous places in the Respondent's business offices, meeting halls, and all other places where notices to members are customarily posted, copies of the attached notice marked "Appendix."[11] Copies of said notice, on forms provided by the Regional Director for Region 13, shall after being duly signed by the Respondent's authorized representative, be posted by Respondent immediately upon receipt thereof and be maintained by it for sixty (60) consecutive days thereafter. Reasonable steps shall be taken to insure that such notices are not altered, defaced, or covered by any other material.

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[11]In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(b) Sign and mail sufficient copies of said notice to the Regional Director for Region 13 for posting by ITT-CESD and C.A. Riley Electric Construction Company at all locations where notices to their respective employees are customarily posted, if they are willing to do so.

(c) Inform its members of its obligations set forth in the provisions of the aforesaid notice, by reading such document during regularly scheduled meetings of the membership, and by mailing a copy of same to each of its current membership.

(d) Notify the Regional Director for Region 13, in writing, within 20 days from the date of the receipt of this Trial Examiner's Decision, what steps Respondent has taken to comply herewith.[12]

Dated at Washington, D.C. February 7, 1972.

/s/ Thomas S. Wilson
Thomas S. Wilson
Trial Examiner

[12]In the event that this recommended Order is adopted by the Board after exceptions have been filed, this provision shall be modified to read: "Notify the Regional Director for Region 13, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith."

NOTICE TO MEMBERS

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT engage in, or induce or encourage any individual employed by C.A. Riley Electric Construction Company, or by any other person engaged in commerce or in an industry affecting commerce, to engage in, a strike or a refusal in the course of his employment, to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services; or threaten, coerce or restrain any other employer or person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is to force and require ITT-CESD to assign the work described below to employees who are members of or represented by Respondent rather than to employees of ITT-CESD, currently represented by Communication Workers of America.

The work involved consists of:

Terminating the cable and installing telephone instruments in Cook County, Illinois.

LOCAL NO. 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO
(Labor Organization)

Dated _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Everett McKinley Dirksen Building, Room 881, 219 South Dearborn Street, Chicago, Ill. 60604. Tel. No. (312) 353-7572

APPENDIX C

191 NLRB No. 122 D–5262
Chicago, Ill.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD

Case 13–CD–209

LOCAL UNION NO. 134, INTERNATIONAL
BROTHERHOOD OF ELECTRICAL WORKERS,
AFL–CIO

and

INTERNATIONAL TELEPHONE & TELEGRAPH
CORPORATION, COMMUNICATIONS
EQUIPMENT AND SYSTEMS DIVISION

and

COMMUNICATIONS WORKERS OF AMERICA,
AFL–CIO

DECISION AND DETERMINATION OF DISPUTE

This is a proceeding under Section 10(k) of the National Labor Relations Act, as amended, following the filing of a charge by International Telephone & Telegraph Corporation, Communications Equipment and Systems Division, herein called the Employer, alleging that Local Union No. 134, International Brotherhood of Electrical Workers, AFL–CIO, herein called Local 134, had violated Section 8(b)(4)(i) and (ii)(D) of the Act by engaging in certain proscribed activity with an object of

forcing or requiring the Employer to assign the work in dispute to members of Local 134 rather than to employees of the Employer represented by Communications Workers of America, AFL–CIO, herein referred to as CWA.

Pursuant to notice, a hearing was held in Chicago, Illinois, before Hearing Officer Stephen S. Schulson on March 12, 15, and 17, 1971. All parties appeared at the hearing and were given full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues. Thereafter, briefs were filed by the Employer, Local 134, and CWA in support of their positions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Hearing Officer made at the hearing and finds them free from prejudicial error. They are hereby affirmed.[1] The Board

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[1] We agree with the Hearing Officer's rulings that it was untimely for Local 134 to attack the validity of the collective-bargaining agreement between the Employer and CWA for 8(a)(2) purposes, and that material subpoenaed by Local 134 was therefore not relevant. Section 10(b) would bar the issuance of a complaint attacking CWA's representative status as of the time the present contract was executed. *Local Lodge No. 1424, International Association of Machinists v. N.L.R.B. (Bryan Manufacturing Company),* 362 U.S. 411. Accordingly, as CWA's representative status could not be litigated under these circumstances, we agree that such evidence could not be adduced in an 8(b)(4)(D) proceeding for the purpose of collaterally attacking CWA's status as statutory bargaining representative.

Local 134 alleges that it was denied substantive due process by what it considers inadequate notice as to the scope of the hearing,

has considered the entire record in this case, including the briefs, and hereby makes the following findings:

I. The Business of the Employer

The parties stipulated, and we find, that International Telephone & Telegraph Corporation, Communications Equipment and Systems Division, is engaged in the distribution and installation of electronic telephone equipment and related products with facilities in the States of Connecticut, Illinois, Tennessee, New York, New Jersey, California, Florida, and other States. During the past calendar year, International Telephone & Telegraph Corporation, Communications Equipment and Systems Division, in the normal course and conduct of its operations, has received goods and materials valued in excess of $100,000 which were shipped to its facilities directly from across state lines. Accordingly, we find that International Telephone & Telegraph Corporation, Communications Equipment and Systems Division, is engaged

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claiming that the Employer and CWA introduced evidence of events occurring beyond the jurisdiction of Local 134 and beyond its knowledge, thereby "tainting" the record. We disagree. The Board has consistently looked to the custom and practice of the industry, employer practice, and contract coverage as factors relevant to its consideration of the merits of the dispute. *International Association of Machinists, Lodge No. 1743, AFL–CIO (J.A. Jones Construction Co.),* 135 NLRB 1402. Local 134 therefore had sufficient notice of the scope of the hearing on these matters. Further, the record, in our view, is of sufficient clarity to support a determination of dispute and an award confined to the area served by Local 134.

Accordingly, we find no merit in Local 134's requests to reopen the hearing.

in commerce within the meaning of Section 2(6) and (7) of the Act and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organizations Involved

The parties stipulated, and we find, that Local Union No. 134, International Brotherhood of Electrical Workers, AFL–CIO, and Communications Workers of America, AFL–CIO, are labor organizations within the meaning of Section 2(5) of the Act.

III. The Dispute

A. *Background Facts*

In 1969, the Federal Communications Commission issued the *Carterfone* decision[2] which allowed private individuals or firms to purchase their own telephone equipment and have it "interconnected" with an operating telephone company system. Prior to this, operating telephone companies had refused to permit private telephone systems to be connected to the operating company's trunklines. The Communications Equipment and Systems Division of International Telephone & Telegraph Corporation was established shortly after the FCC decision, in April 1969. The Employer is engaged in the sale, installation, testing, and maintenance of private telephone systems. The equipment sold by the Employer is manufactured by various divisions of International Telephone & Telegraph Corporation and is typically connected to the trunklines of the local operating telephone company.

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[2] 13 FCC 2d 420.

work in dispute is within the jurisdiction of Local 134 and should be assigned to individuals represented by it. Local 134 offers considerations of area practice, license requirements, economy, the alleged recognition of its jurisdiction by the Employer, the contract between the Employer and CWA, and the loss of job opportunities by members of Local 134, in support of its claim for the work in dispute.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of a dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated. The record indicates that on November 11, Local 134 Business Agent Van Wetering told a representative of the Employer that CWA does not install telephones in Cook County.[7] Later, on November 30, prior to the time employees of the Employer represented by CWA appeared at the jobsite, Van Wetering met with the Employer's director for labor relations, Foster, and stated that Local 134 did the installation and maintenance of telephone equipment in Cook County. Van Wetering also told Foster on that occasion that Local 134 better do the work or there would be "trouble."

On December 3, when the Employer began installation of the EPABX equipment with CWA represented employees, there were Local 134 members employed by Johnson Electric Company, Illinois Bell Telephone Company, and C.A. Riley working at the jobsite. After a Local 134 steward ascertained that the Employer's

[7] Elk Grove, Illinois, is located within Cook County, Illinois.

employees were represented by CWA, he said, "We can't work here." Another Local 134 steward told other Local 134-represented employees that "if they [CWA] are working here we are leaving." Employees of all three contractors thereafter left the building site taking their tools with them.

Local 134 suggests that this testimonial evidence is incredible. In a jurisdictional dispute context, the Board is not charged with finding that a violation did in fact occur, but only that there is reasonable cause to believe that there has been a violation.[8] On this testimony, and without ruling on the credibility of the testimony in issue,[9] we are satisfied that there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred.

The parties have not submitted satisfactory evidence that they have adjusted or agreed upon methods for the voluntary adjustment of this dispute. Under these circumstances, we find that it will effectuate the policies underlying Sections 10(k) and 8(b)(4)(D) of the Act for us to determine the merits of the dispute. Accordingly, we find that this dispute is appropriate for resolution under Section 10(k) of the Act.

On the basis of the entire record in this case, we find that there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that the dispute is properly before the Board for determination.

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[8] *Locals 138, 138A, 138B, 138C, and 138D, International Union of Operating Engineers, AFL–CIO (Cafasso Lathing & Plastering, Inc.)*, 149 NLRB 156, 158–159.

[9] See *Local Union No. 3, International Brotherhood of Electrical Workers, AFL–CIO (Western Electric Company, Incorporated)*, 141 NLRB 888, 893.

E. *Merits of the Dispute*

Section 10(k) of the Act requires the Board to make an affirmative award of the disputed work after giving due consideration to various relevant factors.[10] The Board has held that its determination of a jurisdictional dispute is an act of judgment based upon common-sense and experience reached by balancing those factors involved in a particular case.[11]

The following factors are relevant in making a determination of the dispute before us:

1. Certification and collective-bargaining agreements

Neither labor organization involved herein has been certified by the Board nor is there evidence indicating that a Board certification covers the disputed work.

The Employer is party to a current, nationwide collective-bargaining agreement with CWA. That agreement applies to "installation, replacement, and maintenance operations [of the Employer] in the United States or its possessions." Pursuant to this agreement, the Employer has assigned its employees represented by CWA to perform the work in dispute. The Employer is not, and never has been, party to any collective-bargaining agreement with Local 134. We conclude, therefore, that considerations of collective-bargaining history and agree-

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[10] *N.L.R.B. v. Radio & Television Broadcast Engineers Union, Local 1212, International Brotherhood of Electrical Workers, AFL–CIO (Columbia Broadcasting System)*, 364 U.S. 573, 586.

[11] *International Association of Machinists, Lodge No. 1743, supra.*

ments favor assignment of the work to employees represented by CWA.

2. Area, employer, and industry practice

Local 134 contends that only individuals represented by it have performed PBX installation work in Cook County, except for the instant dispute. In support of this contention, Local 134 relies primarily on the fact that Illinois Bell uses its own employees represented by Local 134 to install PBX equipment in Cook County. There is, however, uncontradicted testimony indicating that employees of Western Electric represented by CWA install and test central office equipment in Cook County for the operating telephone company, Illinois Bell. There is substantial evidence in the record before us to indicate that the work of installing and testing central office switching equipment and the work of installing and testing a PBX system are to a large degree quite similar in nature. Both are intended to "switch" telephone messages, albeit central office equipment is often constructed on a larger scale than is the ordinary PBX system. We note, in this regard, the uncontradicted testimony of the Employer's witness, Fulton, to the effect that a central office equipment man for an operating telephone company would be ideally qualified, by virtue of training and experience, to be a communications technician, the title the Employer gives to its employees performing the work in dispute.

In further support of its claim that its members are entitled to perform the work in dispute on the basis, in part, of established area practice, Local 134 points to a franchise agreement between International Telephone & Telegraph and Midco, Inc., for the installation of interoffice communications equipment (PAX) manufactured

by a division of IT & T in the years 1960 through 1968. Local 134 argues that the Employer thereby recognized its claim to work in dispute. Midco utilized employees represented by Local 134 when installing PAX equipment within the jurisdiction of Local 134. Midco installed only one PBX system, in 1970.

We conclude from the foregoing that considerations of area practice favor neither labor organization in making an award of the work in dispute; while Local 134 has performed all PBX work in the area, CWA-represented employees have performed highly similar work within Cook County. Moreover, area practice alone would not play a controlling role in our decision herein.

The nationwide industry practice is to assign the disputed work to individuals represented by CWA. In this regard, the record shows that it is the Employer's practice, on a nationwide basis, to assign this work to employees represented by CWA. The record also discloses that all installation of PBX equipment manufactured by Western Electric, a competitor of the Employer, is installed by employees of Western Electric or operating telephone companies represented by CWA, with the exception of work performed in Cook County and the State of New Jersey. Employees represented by Local 134 and International Brotherhood of Electrical Workers install Western Electric's PBX equipment in those areas, respectively. We find that Employer and industry practice favor assignment of the work in dispute to employees represented by CWA.

3. Skills and training of employees

In support of its assignment to employees represented by CWA, the Employer argues that the work of electricians and the work of telephone men is completely

dissimilar. Fulton testified that an electrician is neither trained in nor works with electronics or solid state circuitry, while electronics training is the basis for the work of a communications technician. Fulton estimated that it requires 6 years of training for one of its communications technicians to become "fully qualified" to install PBX systems. The Employer also conducts special training classes for particular items of its equipment, including a 4-week training program for the type of PBX installed in the instant dispute.

Local 134 has not alleged that its members have had any experience with the particular type of equipment installed in the Elk Grove Village project, although there are some 40 electricians registered with Local 134's hiring hall who are one-time Bell Systems employees, and at least some of these 40 have had experience with PBX equipment while with Bell. Local 134 maintains no separate listing of its PBX-qualified members.

The record establishes to our satisfaction that the work of a communications technician, as employed by the Employer, and an electrician, as represented by Local 134, is significantly different and requires dissimilar training and techniques. Indeed, Local 134 described itself in its brief as "a union whose members traditionally perform electrical work on new construction work in conjunction with other building trades unions." In our view, the work in dispute is not properly described as "electrical work on new construction work" but rather the installation of an item of highly sophisticated communications equipment. Accordingly, we find that consideration of the factors of skill and special training favor assignment of the disputed work to employees of the Employer represented by CWA.

4. Efficiency and economy of operations

The record indicates that communications technicians employed by the Employer and represented by CWA are paid at a substantially lower hourly rate than are journeymen electricians represented by Local 134. Communications technicians have a maximum hourly wage of $3.27 while a journeyman electrician is rated at almost $8 per hour. A journeyman employee of a sound contractor, also represented by Local 134, receives $5.48 on an hourly basis.

C.A. Riley Company made a bid of $2,600 for the work of terminating the cable. The Employer's witness testified that this bid was about $1,000 too high. Riley's bid for the termination work was based upon an approximate 200 hours of work, later reduced to an estimated 180 hours. The record indicates that employees of the Employer performed this same work in no more than 96 hours.

The sales agreement between the Employer and Elk Grove Village includes a provision that the Employer will perform necessary maintenance work for a period of 1 year. We have found that maintenance requirements often militate in favor of an employer's assignment, especially when factors of training in installation and service of an employer's specific equipment are present.[12] Such factors are present in the instant dispute. We find that factors of both economy and efficiency support an award of the work in dispute to employees represented by CWA.

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[12]See, e.g., *Radio-Television-Sound Technicians Local Union 1139, International Brotherhood of Electrical Workers, AFL–CIO (Motorola Communications and Electronics, Inc.)*, 180 NLRB No. 154.

5. Other factors

Local 134 has raised a number of other issues that, it alleges, supports its claim to the work in dispute. It argues that the Employer failed to comply with certain general licensing requirements for electrical work, and that such requirements extend to the installation of telephone communications equipment.[13] It is undisputed that the Employer was not issued a license for the performance of the work in dispute. The question of licensing, in these circumstances, is irrelevant. Local 134's witness, a supervisor of electrical inspection for Chicago, testified on cross-examination that whether or not an employer's employees were represented by CWA, Local 134, any other union, or no union, was completely immaterial to the requirement of obtaining a license. Thus, licensing requirements, such as they may be, concern the employer's qualifications for the work and not its assignment of it. They provide no assistance in our consideration of the merits of this dispute.

Local 134 also claims that failure to award the work to it will result in a loss of job opportunities for its members. In the context of this case, we do not accord this argument great significance. There are approximately

[13]The Employer argues in its brief that the general licensing requirements for electrical work do not apply to the installation of telephone communications equipment and notes that Local 134's assertion is predicated exclusively upon an interpretation of an allegedly relevant ordinance by a supervisor of electrical inspection for Chicago. Respondent has offered no citation to a court of competent jurisdiction that has squarely ruled upon the applicability of these licensing requirements to the installation of telephone communications equipment such as is present in the instant dispute.

6,000 to 8,000 individuals registered as construction electricians with Local 134's seniority system, and an additional 400 to 500 members of Local 134 are classified as sound, radio-television, and public address electricians. Contrasted with this, the Employer employs an approximate total of 50 communications technicians throughout the nation. The Employer has proposed to locate no more than six technicians in the Chicago area. It is apparent that an assignment of the work to individuals represented by CWA will have no substantial effect upon the job opportunities available to individuals represented by Local 134.

We do not find that the additional considerations alleged by Local 134 provide substantial support in favor of an award to individuals represented by that labor organization.

F. *Conclusions*

Having considered all pertinent factors present here, we conclude that employees represented by CWA are entitled to perform the work in dispute. This assignment is compatible with the collective-bargaining agreement between CWA and the Employer. Such an award is consistent with industry and employer practice, and is not clearly inconsistent with area practice in Cook County regarding the installation of PBX and similar systems. In addition, members of CWA possess the requisite skills and training, the Employer has been satisfied with their performance, and continued assignment will result in greater efficiency and economy of operation. We conclude from all of the foregoing that the Employer's assignment of work to employees represented by CWA should not be disturbed. On the basis of the entire record, therefore, we shall determine the existing

jurisdictional controversy by awarding the work in dispute to employees of the Employer represented by CWA. In making this determination, we are assigning the disputed work to the employees of International Telephone & Telegraph Corporation, Communications Equipment and Systems Division, who are represented by Communications Workers of America, but not to that Union or its members.

G. *Scope of the Determination*

The work which gave rise to the instant dispute has been completed. The Employer and CWA request the award encompass the Employer's entire operation, i.e., nationwide. Alternatively, the Employer and CWA request that the award encompass Cook County, Illinois. Local 134's position throughout the hearing and in its brief to the Board has been that the Notice of Hearing and, therefore, the scope of the work, was limited to the jurisdiction of Local 134, which generally consists of Cook County. As Local 134, has not indicated that it will renounce its claim to the work in dispute, and as the Employer has continued to seek sales agreements within Cook County that include performance of the work in dispute, we find that the dispute is likely to recur between the parties. We shall, therefore, encompass Cook County, Illinois, within the scope of our determination of the dispute.

DETERMINATION OF DISPUTE

Pursuant to Section 10(k) of the National Labor Relations Act, as amended, and upon the foregoing findings and the entire record in this case, the National Labor Relations Board hereby makes the following determination of dispute:

1. Employees of International Telephone & Telegraph Corporation, Communications Equipment and Systems Division, who are currently represented by Communications Workers of America, AFL–CIO, are entitled to perform the work of terminating the cable and installing telephone instruments in Cook County, Illinois.

2. Local Union No. 134, International Brotherhood of Electrical Workers, AFL–CIO, is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force or require International Telephone & Telegraph Corporation, Communications Equipment and Systems Division, to assign the above work to individuals represented by Local Union No. 134, International Brotherhood of Electrical Workers, AFL–CIO.

3. Within 10 days from the date of this Decision and Determination of Dispute, Local Union No. 134, International Brotherhood of Electrical Workers, AFL–CIO, shall notify the Regional Director for Region 13, in writing, whether or not it will refrain from forcing or requiring International Telephone & Telegraph Corporation, Communications Equipment and Systems Division, by means proscribed by Section 8(b)(4)(D) of the Act, to assign the work in dispute to individuals represented by Local Union No. 134, International Brotherhood of Electrical Workers, AFL–CIO, rather than to employees of International Telephone & Telegraph Corporation, Communications Equipment and Systems Division, represented by Communications Workers of America, AFL–CIO.

Dated, Washington, D.C., Jun. 30, 1971.

John H. Fanning, Member

Gerald A. Brown, Member

Ralph E. Kennedy, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX D

ADMINISTRATIVE PROCEDURE ACT

§551. Definitions.

For the purpose of this subchapter–

* * * * *

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

* * * * *

§554. Adjudications

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved–

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a hearing examiner appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of–

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for—

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply–

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty. Pub.L. 89-554, Sept. 6, 1966. 80 Stat. 384.

* * * * *

§556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence–

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more hearing examiners appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of

presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may—

(1) administer oaths and affirmations;

(2) issue subpenas authorized by law;

(3) rule on offers of proof and receive relevant evidence;

(4) take depositions or have depositions taken when the ends of justice would be served;

(5) regulate the course of the hearing;

(6) hold conferences for the settlement or simplication of the issues by consent of the parties;

(7) dispose of procedural requests or similar matters;

(8) make or recommend decisions in accordance with section 557 of this title; and

(9) take other action authorized by agency rule consistent with this subchapter.

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial

evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 386.

§557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

(a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without

further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. When the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearings pursuant to section 556 of this title shall first recommend a decision, except that in rule making or determining applications for initial licenses–

(1) instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision; or

(2) this procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires.

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions–

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of–

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

APPENDIX E

LABOR MANAGEMENT RELATIONS ACT OF 1947

* * * * *

§158. Unfair labor practices

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents–

* * * * *

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is–

* * * * *

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

* * * * *

§160. Prevention of Unfair Labor Practices

* * * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought

may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * * * *

(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the

parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

APPENDIX F

RULES AND REGULATIONS OF THE NATIONAL LABOR RELATIONS BOARD, SERIES 8, AS AMENDED

29 C.F.R. §101.31 – §101.35

Subpart F–Jurisdictional Dispute Cases Under Section 10(k) of the Act

Sec. 101.31 *Initiation of proceedings to hear and determine jurisdictional disputes under section 10(k).*–The investigation of a jurisdictional dispute under section 10(k) is initiated by the filing of a charge, as described in section 101.2, by any person alleging a violation of paragraph (4)(D) of section 8(b). As soon as possible after a charge has been filed, the regional director serves on the parties a copy of the charge together with a notice of the filing of such charge.

Sec. 101.32 *Investigation of charges; withdrawal of charges; dismissal of charges and appeals to Board.*–These matters are handled as described in section 101.4 to 101.7, inclusive. Cases involving violation of paragraph (4)(D) of section 8(b) in which it is deemed appropriate to seek injunctive relief of a district court pursuant to section 10(1) of the act are given priority over all other cases in the office except other cases under section 10(1) of the act and cases of like character.

Sec. 101.33 *Initiation of formal action; settlement.* –If, after investigation, it appears to the regional director that the Board should determine the dispute under section 10(k) of the act, he issues a notice of hearing which includes a simple statement of issues involved in the jurisdictional dispute and which is served on all parties to the dispute out of which the unfair labor practice is alleged to have arisen. The hearing is scheduled for not less than 10 days after service of the notice of the

filing of the charge, except that in cases involving the national defense, agreement will be sought for scheduling of hearing on less notice. If the parties present to the regional director satisfactory evidence that they have adjusted the dispute, the regional director withdraws the notice of hearing and either permits the withdrawal of the charge or dismisses the charge. If the parties submit to the regional director satisfactory evidence that they have agreed upon methods for the voluntary adjustment of the dispute, the regional director shall defer action upon the charge and shall withdraw the notice of hearing if issued. The parties may agree on an arbitrator. a proceeding under section 8(c) of the act, or any other satisfactory method to resolve the dispute. If the agreed-upon method for voluntary adjustment results in a determination that employees represented by a charged union are entitled to perform the work in dispute, the regional director dismisses the charge against that union irrespective of whether the employer complies with that determination.

Sec. 101.34 *Hearing.*—If the parties have not adjusted the dispute or agreed upon methods of voluntary adjustment, a hearing, usually open to the public, is held before a hearing officer. The hearing is nonadversary in character, and the primary interest of the hearing officer is to insure that the record contains as full a statement of the pertinent facts as may be necessary for a determination of the issues by the Board. All parties are afforded full opportunity to present their respective positions and to produce evidence in support of their contentions. The parties are permitted to argue orally on the record before the hearing officer. At the close of the hearing, the case is transmitted to the Board for decision. The hearing officer prepares an analysis of the issues and the evidence, but makes no recommendations in regard to resolution of the dispute.

Sec. 101.35 *Procedure before the Board.*—The parties have 7 days after the close of the hearing, subject to any extension that may have been granted, to file briefs with the Board and to request oral argument which the Board may or may not grant. However, in cases involving the national defense and so designated in the notice of hearing, the parties may not file briefs but after the close of the evidence may argue orally upon the record their respective contentions and positions, except that for good cause shown in an application expeditiously made to the Board in Washington, D.C., after the close of the hearing, the Board may grant leave to file briefs in such time as it shall specify. The Board then considers the evidence taken at the hearing and the hearing officer's analysis together with any briefs that may be filed and the oral argument, if any, and issues its determination or makes other disposition of the matter.

MAR 25

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-1313

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION, COMMUNICATIONS EQUIPMENT AND SYSTEMS DIVISION,

Petitioner,

vs.

LOCAL 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF IN OPPOSITION.

ROBERT E. FITZGERALD, JR.,
EDWARD J. CALIHAN, JR.,
53 West Jackson Boulevard,
Chicago, Illinois 60604,
Attorneys for Respondent.

Gunthorp-Warren Printing Company, Chicago • 346 1717 [redacted]56

IN THE

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Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF IN OPPOSITION.

The Respondent, Local 134, International Brotherhood of Electrical Workers, AFL-CIO (hereinafter referred to as Local 134) opposes the Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit filed by the Petitioner, International Telephone and Telegraph Corporation, Communications Equipment and Systems Division (hereinafter referred to as ITT).

STATEMENT OF THE CASE.

Local 134 accepts the statement of the case by ITT through the first full paragraph on Page 4 of the Petition which states that the attorney for the National Labor Relations Board (hereinafter, Board) who prosecuted the unfair labor practice case was the same person who presided at the 10(k) hearing.

However, it is factually incorrect for Petitioner to state that the Board petitioned the Court of Appeals for the Seventh Circuit for enforcement of the Board's order, as it was Local 134 which filed a petition to review and set aside the order of the Board, and the Board filed a cross application for enforcement.

The further contentions set out in the statement of the case, that the Court of Appeals accepted fully, both the Board's jurisdictional determination and its unfair labor practice decision, is disputed by Local 134. In its petition to review and set aside the Board's order, Local 134 presented in its statement of issues, seven separate issues for determination by the Court of Appeals. These issues concern three main categories of arguments, which are as follows: (1) Violations of the Administrative Procedure Act (hereinafter APA) by the Board in the conduct of both of its hearings; (2) other violations of procedural due process and of law in the conduct of the 10(k) hearing itself and (3) other violations of procedure and law by the Board in its conduct of its unfair labor practice hearing.

However, the Court did not consider, nor pass upon, all of the arguments presented by Local 134 as to all of the issues because it found that the clear violation of the APA served as a basis for denying enforcement of the Board's award. On this point, the arguments of Local 134 as to violations of the APA were of two-fold in nature. The first argument was that which was accepted by the Seventh Circuit for the denial of enforcement, namely the commingling of adjudicative and prosecutorial functions in the same employee of the Board. However, the

second argument concerning a violation of the APA was the failure of the Board to assign one of its administrative law judges to hear the 10(k) proceedings. The Seventh Circuit did not specifically rule upon the second APA violation argument in light of its finding that the first argument had merit.

ARGUMENT.

I. Lack of Direct Conflict Between Circuits.

ITT states as its primary reason for granting of the petition, the allegation that this decision of the Seventh Circuit is in *direct* conflict with a decision of the Circuit Court of Appeals for the District of Columbia. This is erroneous because the decision of the District of Columbia Circuit relied upon is *Bricklayers, Masons, and Plasters International Union* v. *N. L. R. B.*, 475 F. 2d 1516. In the *Bricklayers'* case the issue decided by that Court was the second issue argued by Local 134 to the Seventh Circuit, namely that the Board had violated the APA by its failure to appoint an administrative law judge to hear the 10(k) proceedings. However, the Seventh Circuit did not address itself to that argument by Local 134 because it found merit to the initial argument concerning the violation of the APA, namely the commingling of functions. Therefore, there can be no *direct* conflict between the decision of the Court of Appeals for the District of Columbia and the Seventh Circuit Court of Appeals in the instant case because the decision in the *Bricklayers'* case did not decide the question of the commingling of functions since that question was not before it.

This Court has long held that it will not accept as a basis for its granting a petition, an alleged conflict between the Circuits, where in fact no real conflict exists. There are numerous reasons which the Court has used to deny a petition when no real conflict between the Circuits exist. One of the bases for denial is where the decision below can be sustained on an independent or

alternative ground even though a conflict between the Circuits on an otherwise important issue may exist. *The Monrosa* v. *Carbon Black Inc.*, 359 U. S. 180. This Court said:

> "While this court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial. Resolution here of the extent to which these bills of lading provisions may be given effect by our courts can await a day when the issue is posed less abstractly." 359 U. S. 180 at page 184.

The petition by ITT is a clear example of an attempt to create a conflict between Circuits where no direct conflict exists and where the decision below may be sustained on independent grounds.

A separate basis for this Court having denied a writ of certiorari is a situation where the Court will be able to decide the case on another ground, and thus not reach the point upon which there is a conflict. *Sanson Hosiery Mills* v. *NLRB*, 334 U. S. 863 and *The Arlington Inc.* v. *Mayer*, 399 U. S. 965.[1] In the instant case, this Court may sustain the decision of the Seventh Circuit on the ground that there was a clear violation of the APA by the improper commingling of adjudicative and prosecutional functions. By doing so, this Court need not reach the point concerning the need for an administrative law judge to hold the 10(k) hearings, as was stated by the Seventh Circuit as obiter dicta in the instant decision.

Yet another basis for denying a writ is a case where the resolution of a clear conflict is irrelevant to the ultimate outcome of the case before the Court, *Sommerville* v. *U. S.*, 376 U. S. 909.[2] Even assuming that a clear conflict exists, any resolution of the requisite for an administrative law judge to hear the jurisdictional dispute, is irrelevant to the ultimate outcome of the case

1. See R. Stern & E. Gressman, Supreme Court Practice, page 157 (4th ed., 1969).

2. Stern & Gressman, *supra*, p. 158.

before the Court. If that question is resolved, the decision of the Seventh Circuit would stand and deny enforcement of the NLRB order, because it is based on the APA violation of an improper commingling of functions. Further, there are other, as yet unresolved, issues which were raised by Local 134, that would require decision by that Court. Thus, a determination by this Court on the question of the necessity for an Administrative Law Judge, would be irrelevant to the ultimate outcome of this case.

Therefore, it is clear that the Court has not, and will not, automatically grant a writ of certiorari upon the contention that a direct conflict between Circuits does exist. Local 134 submits to the Court that no such direct conflict does exist. However, even if the alleged direct conflict did exist, this Court should not grant the writ for the variety of reasons set out above.

II. No Important Question of Federal Law.

The petition of ITT contends, as a second basis for this Court to grant the writ, the contention that the decision raises an important question of federal law that should be decided by this Court. ITT's petition contends that the Seventh Circuit's decision, that a 10(k) proceeding is an adjudication within § 554 would lead to many procedural problems. These alleged procedural problems are: first, the requirement that a jurisdictional dispute hearing be conducted by an administrative law judge under § 556; second, that the Judge render a recommended decision as required by § 554(d) and § 557; third, that the parties have an opportunity to submit proposed findings and conclusions before the recommended decision is reached; and fourth, a party could take exceptions to that decision after issued as required by § 557(c). While all of the above requirements are procedural rights which Local 134 and other parties before 10(k) proceedings may be desirous of obtaining, such consequences do not necessarily follow from the Seventh Circuit's decision. All that specifically must follow from the Seventh

Circuit's decision is that the Board cease its conduct of engaging in the gross violation of the APA by commingling the prosecutorial and adjudicatory function in the same individual. This is a matter that can obviously be easily remedied by the NLRB. Indeed the Petition of ITT concedes this fact, and admits that the NLRB does not ordinarily commingle the functions by assigning the same person to these tasks in related 10(k) and unfair labor practice hearings.

The ease of accomplishing this procedural remedy can be clearly seen from the fact that the Board did not consider the Seventh Circuit's decision sufficiently onerous to require it to file its own Petition for Certiorari. The Board has closed the original case on its records by letter dated February 6, 1974.[3]

The Board may well file a memorandum with this Court, urging that it did not violate the clear prohibitions of Section 554 of the APA and the rationale of *Wong Yong Sung* v. *McGrath*, 399 U. S. 33. However, the Board's failure to file a

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3. NATIONAL LABOR RELATIONS BOARD
Region 13
881 Everett McKinley Dirksen Building
219 South Dearborn Street, Chicago, Illinois 60604
Telephone: (312) 353-7597

February 6, 1974

Robert E. Fitzgerald, Jr., Esq.
53 West Jackson Boulevard, Suite 1112
Chicago, Illinois 60604

Re: Local No. 134, International Brotherhood of Electrical Workers
(ITT Communications Equipment and Systems Division)
Case No. 13-CD-209

Dear Sir:

This is to advise you that we have closed our records in the above-entitled case.

Very truly yours,
/s/ Ross M. Madden
Ross M. Madden
Regional Director

Petition appears to indicate that it is taking an enlightened view and in the future will separate the performance of the two functions into different individuals.

CONCLUSION.

The petition should be denied because there is no direct conflict between Circuits on substantive issues and because there is no important question of federal law which must be decided by this Court. Further the decision of the Seventh Circuit is a correct interpretation of the Administrative Procedure Act as exemplified by this Court's decision in *Wong Yong Sung* v. *McGrath, supra,* because it prohibits the unlawful commingling of the prosecutorial and adjudicatory functions. As was clearly stated by this Court in the decision of *NLRB* v. *Brown,* 380 U. S. 278.

> "Courts must, of course, set aside Board decisions which rest on an 'erroneous legal foundation; *National Labor Relations Board* v. *Babcock and Wilcox Co.*" 350 U. S. 278 at page 299.

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cc: John D. O'Brien, Esq.
Seyfarth, Shaw, Fairweather & Geraldson
111 West Jackson Boulevard
Chicago, Illinois 60604

Jerome Schur, Esq.
Katz & Friedman
7 South Dearborn Street
Chicago, Illinois 60603

Local Union No. 134, International Brotherhood of Electrical Workers, AFL-CIO
600 West Washington Street, Chicago, Illinois 60606

Communications Workers of America, AFL-CIO
7460 North Sheridan Road, Chicago, Illinois 60626

International Telephone & Telegraph Corp., Communications Equipment and Systems Division
191 Biesterfield Road, Elk Grove Village, Illinois 60007

ITT-Communications Equipment and Systems Division
60 Washington Street, Hartford, Connecticut 06106

In the instant case the Board's decision was based upon an erroneous legal foundation and was correctly denied enforcement by the Seventh Circuit.

For the above and foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

EDWARD J. CALIHAN, JR.,
ROBERT E. FITZGERALD, JR.,
53 West Jackson Boulevard,
Chicago, Illinois 60604,
Attorneys for Respondent.

SUPREME COURT, U. S.
MAR 28 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1313

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION, COMMUNICATIONS EQUIPMENT AND SYSTEMS DIVISION,

Petitioner,

vs.

LOCAL 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Respondent.

BRIEF OF RESPONDENT CWA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

CHARLES V. KOONS,
IRVING M. FRIEDMAN,
JEROME SCHUR,
HAROLD A. KATZ,
Attorneys for CWA.

KANE & KOONS,
1100 Seventeenth St., N. W.,
Washington, D. C. 20036.

KATZ & FRIEDMAN,
7 South Dearborn,
Chicago, Illinois 60603.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1313.

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION, COMMUNICATIONS EQUIPMENT AND SYSTEMS DIVISION,

Petitioner,

vs.

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BRIEF OF RESPONDENT CWA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Respondent, Communications Workers of America (hereinafter CWA) makes this statement in response to the Petition for Writ of Certiorari filed by International Telephone and Telegraph Corporation, Communications Equipment and Systems Division (hereinafter ITT-CESD). CWA was a party in all the proceedings below.

CWA supports the Petition for a Writ of Certiorari.

CWA adopts the Petition of ITT-CESD in its entirety.

For the reasons set out in the Petition, the Petition for Writ of Certiorari should be granted.

Respectfully submitted.

CHARLES V. KOONS,
IRVING M. FRIEDMAN,
JEROME SCHUR,
HAROLD A. KATZ,
Attorneys for CWA.

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INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION, COMMUNICATIONS EQUIPMENT AND SYSTEMS DIVISION, PETITIONER

v.

LOCAL 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

1. Following a hearing conducted pursuant to Section 10(k) of the National Labor Relations Act, 29 U.S.C. 160(k), the Board issued a decision awarding certain disputed work to the employees of petitioner Company represented by the Communications Workers of America rather than to those represented by respondent Local 134 (Pet. App. C, 1c-17c). When Local 134 refused to abide by the Board's award and continued to exert economic pressure on the Company for the work, an unfair labor practice complaint issued against Local 134 and the Board, after further hearing, found that Local 134 had violated Section 8(b)(4)(D) of the Act, 29 U.S.C. 158(b)(4)(D). The Board ordered Local 134 to cease its unlawful conduct (Pet. App. B, 1b-24b).

The court of appeals held that the Board's findings and conclusions were supported by the record (Pet. App. A, 4a-6a). However, it declined to enforce the Board's order on the ground that, since "the hearing officer in the §10(k) proceeding subsequently served in a prosecutorial capacity as counsel for the General Counsel at the §8 Unfair Labor Practice Hearing," the Board's procedure violated Section 554 of the Administrative Procedure Act, 5 U.S.C. 554 (Pet. App. A, 6a).[1] The court based its conclusion on the premises that "[i]t is apparently admitted that §554 applies to §10(k) hearings" (Pet. App. A, 8a), and that "the §10(k) hearing officer in this case is the equivalent of a hearing examiner for purposes of §556" (*id.* at 8a, n. 3).[2]

2. The basic question presented by the petition is whether a proceeding to resolve a jurisdictional dispute under Section 10(k) of the National Labor

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[1]Section 554, which applies "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing," provides, in relevant part, that:

> (d) * * * An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review * * *, except as a witness or counsel in public proceedings. * * *

[2]Section 556(b) of the Administrative Procedure Act provides, in relevant part, that, in hearings required to be conducted in accordance with Section 554, "[t]here shall preside at the taking of evidence * * * one or more hearing examiners appointed under section 3105, of this title." Section 3105, in turn, provides that hearing examiners "may not perform duties inconsistent with their duties and responsibilities as hearing examiners."

Relations Act is an "adjudication" within the meaning of the Administrative Procedure Act, so that the provisions of the latter Act respecting adjudications are applicable to Section 10(k) proceedings. The Board believes that the court of appeals erred in answering that question affirmatively.[3] Moreover, its decision on that question conflicts with that of the District of Columbia Circuit in *Bricklayers, Masons and Plasterers Int'l Union* v. *National Labor Relations Board*, 475 F. 2d 1316, 1318-1321. The Board did not file a petition for a writ of certiorari in the present case, however, because it concluded that it presented the issue of the

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[3]A Section 10(k) proceeding is not an "adjudication" within the meaning of the Administrative Procedure Act because it is not a "final disposition * * * of an agency" (5 U.S.C. 551(6)). See *National Labor Relations Board* v. *Plasterers' Union*, 404 U.S. 116, 126-127; *Marine Cooks and Stewards (Irwin-Lyons Lumber Co.)*, 83 NLRB 341. Moreover, the court of appeals misconceived the role of a hearing officer in a Section 10(k) proceeding:

> The hearing is nonadversary in character, and the primary interest of the hearing officer is to insure that the record contains as full a statement of pertinent facts as may be necessary for a determination of the issues by the Board. * * * At the close of the hearing, the case is transmitted to the Board for decision. The hearing officer prepares an analysis of the issues and the evidence, but makes no recommendations in regard to resolution of the dispute. [29 C.F.R. 101.34; Pet.App. F. 2f.]

applicability of the Administrative Procedure Act in a factual setting which was not likely to recur.[4]

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel,
National Labor Relations Board.

APRIL 1974.

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[4]It is not general practice to use the same person who hears the Section 10(k) case to investigate and prosecute the subsequent Section 8(b)(4)(D) case. See *Int'l Longshoremen's and Warehousemen's Union (General Ore, Inc.)*, 124 NLRB 626, 628-629.

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LOCAL 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF PETITIONER

MATTHEW E. MURRAY
JOHN D. O'BRIEN
PETER J. HURTGEN
Attorneys for Petitioner

SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON
1819 H Street, N.W.
Washington, D. C. 20006

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

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On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 486 F.2d 863. The Decision and Order of the National Labor Relations Board, which was reviewed by the Court of Appeals, is reported at 197 NLRB No. 127. The Decision and Determination of Dispute of the National Labor Relations Board, which is the Board's determination of a union jurisdictonal dspute, is reported at 191 NLRB 828.

JURISDICTION

The judgment of the Court of Appeals was entered on September 20, 1973 (A. 72). Thereafter, a rehearing was sought which was denied by the Court of Appeals on November 26, 1973 (A. 73). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1), the Petition for a Writ of Certiorari having been filed within ninety (90) days after the Court of Appeals' denial of rehearing.

STATUTES AND REGULATIONS INVOLVED

The following sections of the Labor Management Relations Act (L.M.R.A.), 29 U.S.C. § 151 *et seq.* are applicable to this case and are appended verbatim to the Petition: § 8(b)(4)(D), § 10(f) and § 10(k). The following pertinent sections of the L.M.R.A. are appended verbatim to the Brief: § 10(b), § 10(j) and § 10(l). The following sections of the Administrative Procedure Act (A.P.A.), 5 U.S.C. § 500 *et seq.* are applicable and are appended verbatim to the Petition: § 551(6), § 551(7), § 554, § 556 and § 557. Section 101.34 of the National Labor Relations Board's Statements of Procedure, 29 C.F.R. § 101.34 is applicable to this case and is appended verbatim to the Petition.

QUESTIONS PRESENTED

1. Whether a jurisdictional dispute proceeding under § 10(k) of the Labor Management Relations Act must be conducted in accordance with the provisions of the Administrative Procedure Act applicable to adjudications.

2. Whether the subsequent prosecution of the unfair labor practice case by the same N.L.R.B. attorney who presided at the prior § 10(k) hearing violated the Administrative Procedure Act's proscription of commingling prosecutorial and decisional functions.

STATEMENT OF THE CASE

Upon a charge filed by ITT-CESD on December 3, 1970, a hearing was held in March, 1971, before a duly designated hearing officer of the National Labor Relations Board (hereinafter designated as "Board"). This hearing was conducted under § 10(k) of the Labor Management Relations Act, 29 U.S.C. § 160(k), for the purpose of receiving facts concerning competing work jurisdiction claims by Local 134, International Brotherhood of Electrical Workers (hereinafter designated as "Local 134") and the Communications Workers of America (hereinafter designated as "CWA").

The hearing officer was not an administrative law judge (formerly designated as trial examiner) and the hearing was conducted in accordance with the Board's long-standing Statements of Procedure for the handling of such cases, 29 C.F.R. § 101.34, providing for a hearing, "non-adversary in character" for which "the primary interest of the hearing officer is to insure that the record contains as full a statement of the pertinent facts as may be necessary for a determination of the issues by the Board." As is further provided in the Board's Statements of Procedure, at the close of the hearing, the case was transmitted to the Board for decision with an analysis prepared by the hearing officer but without any recommendation by him in regard to the resolution of the dispute.

Local 134 raised no objection at the hearing, nor in its brief to the Board, to the conduct of the hearing by a hearing officer, as opposed to an administrative law judge; to its inability to submit recommended findings to the hearing officer; or to the failure of the hearing officer to render a recommended decision. In short, no procedural objections premised upon the provisions of the A.P.A. applicable to "adjudications" were raised by Local 134 at any stage of the § 10(k) proceeding.

The Board issued its Decision and Determination of Dispute on June 30, 1971, wherein it awarded the disputed work to employees of ITT-CESD represented by the CWA, rather than to employees of other employers, represented by Local 134 (A. 9).

Following the refusal of Local 134 to comply with the Board's jurisdictional award, a complaint against Local 134 issued, alleging a violation of § 8(b)(4)(D) of the L.M.R.A., and a § 10(b) hearing was held thereon before an Administrative Law Judge, in accordance with the Board's Statements of Procedure, 29 C.F.R. § 101.36. At this adversarial hearing, the attorney who prosecuted the case on behalf of the Board's General Counsel, was the same individual who had previously presided at the § 10(k) hearing as the hearing officer. However, Local 134 raised no objection during the hearing before the Administrative Law Judge to this Board attorney's prosecution of the § 8(b)(4)(D) unfair labor practice. The first objection raised by Local 134 concerning a violation of the A.P.A. was presented in its brief to the Administrative Law Judge and complained for the first time that the same attorney who had presided at the § 10(k) hearing should not have prosecuted the unfair labor practice case.

Neither the Administrative Law Judge nor the Board, commented upon Local 134's belated objection premised on the A.P.A. The Administrative Law Judge's decision and recommended order was issued on February 7, 1972, finding that Local 134 had violated § 8(b)(4)(D) (A. 34). On June 22, 1972, the Board issued its Decision and Order affirming the findings of the Administrative Law Judge (A. 51).

Thereafter, Local 134 petitioned the Court of Appeals for the Seventh Circuit to review and set aside the

Board's Decision and Order, and the Board cross-petitioned for enforcement pursuant to 29 U.S.C. § 160(e) (A. 56, 60).

On September 20, 1973, the Court of Appeals issued its Order denying enforcement of the Board's Decision and Order. The Court of Appeals did not disturb the Board's jurisdictional award but rather found that:

> "Testimony at the § 10(k) hearing clearly indicates that employees represented by CWA customarily install and test equipment similarly to that involved here in Cook County and the Board determined that by area, employer, and industry practice, and by skill and training, the CWA employees were more entitled to perform the disputed work than employees of Local 134." (486 F.2d at 865). (A. 66).

The Court of Appeals also did not disturb the Board's findings and conclusions in the subsequent unfair labor practice proceedings. Specifically, the Court of Appeals held that:

> "[ITT-CESD] was coerced by Local 134 in an attempt to have the work assigned to employees the Local represents. In these circumstances the employer was 'trapped' in a jurisdictional dispute between the two contesting unions. . . . Such is the very activity § 8(b)(4)(D) was intended to prohibit." (486 F.2d at 866). (A. 67-68).

The basis for the Court of Appeals' denial of enforcement of the Board's Order, was that the individual who acted as the hearing officer in the § 10(k) proceeding was not an administrative law judge pursuant to 5 U.S.C. § 556 and also that the same person later acted as the prosecutor of the unfair labor practice complaint. On these facts, the Court of Appeals concluded that there had been a commingling of prosecutorial and decisional functions in violation of § 554 of the A.P.A.

SUMMARY OF ARGUMENT

The Seventh Circuit has held that "both the spirit and the letter" of § 554 of the A.P.A. require that § 10(k) proceedings under the L.M.R.A. be conducted in accordance with the A.P.A. provisions applicable to "adjudications". According to its decision, a § 10(k) hearing must be conducted by an administrative law judge as required by § 556; and the administrative law judge must render a recommended decision as required by § 554(d) and § 557. The recommended decision of the administrative law judge, determining a jurisdictional dispute, would then, according to the Seventh Circuit, be reviewable by the Board and, without an unfair labor practice proceeding, become a final agency order subject to judicial review.

In so holding, the Seventh Circuit has failed to recognize the Congressional intent underlying enactment of the A.P.A. as well as the reasons for enactment of § 10(k) of the L.M.R.A. Analysis of § 554, as well as its legislative history clearly shows it is applicable only to accusatory proceedings involving a prosecutorial function. In enacting the A.P.A., Congress was primarily concerned that in proceedings involving "adjudications" and leading to a final agency order, that the prosecutorial and decisional functions would be handled by different persons completely independent of one another. Congress also felt strongly that hearing examiners should render the initial decision in these accusatory proceedings, and that their decisions be rendered completely free of supervision by any person directly under the authority of the agency which would finally pass on their initial decisions.

The Congressional intent reflected in the A.P.A. is that the scheme for these accusatory proceedings is that the hearing, or trial, would lead directly to the examiner's initial, independent decision, followed by review

of that decision by the agency without further evidentiary hearings, and that the order then issued would be judicially reviewable.

When the legislative history of the L.M.R.A. is viewed against the backdrop of the A.P.A.'s legislative history, it becomes clear that Congress did not intend § 10(k) proceedings to be adjudications within the A.P.A.'s meaning. The L.M.R.A.'s legislative history reflects that the passage of § 10(k) and related sections 8(b)(4)(D), 10(j) and 10(l), were intended to be an interlocking statutory scheme designed to quickly end jurisdictional strikes. It was Congress' objective to protect the public and employers from the economic havoc caused by the prolongation of such strikes. Section 10(k) as well as sections 10(j) and 10(l) were merely intended to be additional procedures, ancillary to an accusatory proceeding under § 8(b)(4)(D), in order to achieve this objective. This is supported by a significant omission from § 10(k) of provisions of the Senate's original version of that section which provided for the Board's appointment of arbitrators to hear jurisdiction disputes, and which made awards of such arbitrators final and judicially reviewable. These provisions in the Senate version were dropped in conference with the House. From their omission it can be inferred that the Senate was persuaded that final and judicially reviewable § 10(k) determinations, in light of § 10(j) and § 10(l), were unnecessary to achieve the Congressional purpose of quickly resolving the cause of jurisdictional strikes. It was hoped that the § 10(k) procedure would resolve the dispute precisely because such a resolution would avoid the time consuming processes of a Board hearing and adjudication, followed by judicial enforcement.

A consideration of both the legislative history of the A.P.A. and the L.M.R.A. leads to the conclusion that Congress did not intend § 10(k) proceedings to be ad-

judications within the meaning of § 554. This Court's decision in *N.L.R.B. v. Plasterers' Union No. 79*, 404 U.S. 116 (1971) clearly acknowledged that a § 10(k) decision is not binding on any party (even the striking union), and that the award is not an order. We ask the Court in the case at bar to logically extend its *Plasterers'* decision and hold that such a non-binding decision which does not constitute an order is, therefore, not an "adjudication" within the intendment of the A.P.A.

The Congressional purposes for the enactment of the A.P.A. and the L.M.R.A. one year later must be accommodated so as to preserve to each the essential goals for which they were enacted. The only reasonable basis for such an accommodation is to construe § 10(k) determinations as essentially the same kind of proceedings as § 9 representation proceedings, which are expressly exempted from the class of adjudications under § 554. Such a construction does not unduly strain the "certification of worker representatives" exemption in § 554(a)(6). A determination of dispute and Board award of work under § 10(k) is, in effect, a certification of which worker representative's members should perform disputed work. The only distinguishable feature between resolutions of worker certification under § 9 and resolutions of work disputes under § 10(k) is that the latter proceeding is triggered by a strike or a threat of a strike by one of the competing unions. Both types of proceedings are non-accusatory, do not involve a prosecution for any statutory violation, and neither result in a binding order. In both, the facts gathered are generally undisputed and relate to the kind of work performed by designated groups or classes of employees, bargaining history, the organizational structure of the employer's business, and other economic facts from which the Board determines the appropriate unit for bargaining or the appropriate union or group to which work should be assigned. Both § 9(c)

and § 10(k) hearings are held to elicit the same kind of evidence; neither results in an order of the Board; and neither, therefore, should be conducted as an adjudication.

Rather than accommodate the purposes of both statutes, the Seventh Circuit's decision has created an irreconcilable conflict between the two (2) and has also totally emasculated the essential purpose for § 10(k)'s enactment. The net result of the decision below is that a jurisdictional award is a final order of the Board as that term is used in the A.P.A., notwithstanding that Congress has provided that it is not an order under the L.M.R.A. If it is an order under the A.P.A., it is subject to judicial review; however, if it is not an order under the L.M.R.A., it is not subject to judicial review. If it is subject to judicial review, a court of appeals would render a pronouncement on the propriety of the Board's determination of which union is to perform the work but any non-compliance would only result in the prosecution of an unfair labor practice complaint, producing another adjudication, another order, and possibly another review in the court of appeals. Such an extraordinary and time-consuming process is an absurdity which this Court, under its established principles of statutory interpretation, should not allow to prevail.

The Seventh Circuit's decision overturns the Board's consistent procedure for the resolution of jurisdictional disputes and its interpretation that § 10(k) determinations are not adjudications. This procedure, embodying the Board's interpretation, was established contemporaneously with the passage of § 10(k) in 1947 and was unchallenged in court until the case at bar and *Bricklayers, Masons and Plasterers International Union of America* v. *N.L.R.B.*, 475 F.2d 1316 (C.A.D.C., 1973). The Board's interpretation of its statutory mandate under § 10(k) is entitled to great weight.

The factual basis which caused the Seventh Circuit to deny enforcement of the Board's order in this case was the prosecution of the unfair labor practice complaint against Local 134 by the same Board attorney who had conducted the prior § 10(k) hearing. Even if a § 10(k) hearing is not literally an adjudication within the meaning of § 554 of the A.P.A., the Court of Appeals has held that the spirit of subsection 554(d) was violated by a commingling of prosecutorial and decisional functions. In so holding, however, the Seventh Circuit has misconceived the nature of the § 10(k) hearing and the hearing officer's role. The hearing officer does not share any decisional authority with the Board in a jurisdictional dispute determination. He makes no recommended decision. Even if conducting the hearing is construed to be decisional, the prosecution does not occur until after the § 10(k) determination, and the hearing officer could not foresee that he would subsequently prosecute the case because the Board normally assigns a different attorney to prosecute. The most serious misconception of the Court of Appeals is its impression that the hearing officer is engaged in the preparation of the prosecution while he presides at the § 10(k) hearing. The Court of Appeals likened the hearing officer's role to that which was denounced by the Court in *Wong Yang Sung* v. *McGrath*, 339 U.S. 33 (1950), as improper commingling of functions by a presiding inspector in deportation proceedings. A § 10(k) hearing, however, is completely dissimilar to a deportation hearing, the latter being an accusatorial proceeding wherein the presiding inspector has the duty of making the case as strong as is necessary to support the charges against the alien. In a § 10(k) hearing, the hearing officer does not have a duty, nor is he even allowed, to fashion a case for or against one union over the other.

There is no claim of any prejudice or impropriety which Local 134 suffered by reason of any of the viola-

tions of the A.P.A. found by the Seventh Circuit. In fact, Local 134 never raised an objection to the same attorney prosecuting the complaint until it filed its brief with the Administrative Law Judge, long after the hearing had ended and the record in the case was closed.

ARGUMENT

The Court Of Appeals Decision Requires That Jurisdictional Dispute Hearings Under § 10(k) Be Conducted By Administrative Law Judges And Makes Determination Of Such Disputes By The Board A Final Appealable Order Subject To Judicial Review.

The issue in this case is essentially the same as that presented to the Court of Appeals for the District of Columbia in *Bricklayers, Masons & Plasterers International Union of America* v. *N.L.R.B.*, 475 F.2d 1316 (C.A.D.C., 1973). There the Board determination of dispute under § 10(k) was claimed by the Bricklayers Union to be improper because it had been made without a recommended decision of a trial examiner. The Union contended that a recommended decision was required "in every case of adjudication required by statute to be determined on the record after an opportunity for an agency hearing. . ." (5 U.S.C. § 554(a)). The court held that a § 10(k) determination is not an adjudication within the meaning of § 554 and Judge Fahy, speaking for the court, framed the issue by saying:

> ". . . only if a section 10(k) determination is an adjudication within the meaning of section 554 would a recommended decision have been required." (*Id.* at 1318)

The Seventh Circuit, contrary to the holding of the District of Columbia Circuit in the *Bricklayers* case, held that a § 10(k) determination is an "adjudication" within the meaning of that term as used in § 554 of the Administrative Procedure Act. It based its decision on

the fact that because the hearing officer in the § 10(k) proceeding subsequently prosecuted the unfair labor practice complaint in a § 10(b) hearing, there occurred a violation of "both the spirit and the letter" of § 554(d) of the Administrative Procedure Act (A. 71). This section of the A.P.A., among other things, bars the commingling of adjudicatory and prosecutorial functions. In holding this section applicable to § 10(k) proceedings under the L.M.R.A. the Court of Appeals concluded that such proceedings constitute an "adjudication" as that term is used in subsection 554(a) of the A.P.A.

Section 554 of the A.P.A. is applicable, as it states, only to a "case of adjudication required by statute to be determined on the record after opportunity for an agency hearing. . . ." Except for those matters excluded by subsections 554(a)(1)-(6), such adjudications are required by other provisions of § 554, § 556 and § 557 to be conducted in accordance with stated procedural safeguards. Subsection 554(d) relates to the separation of decisional and prosecutorial functions and mandates that the agency employee presiding at the reception of evidence "shall make the recommended decision or initial decision" and refers to § 556 which requires that such person be a hearing examiner appointed under § 3105. Subsection 556(c) also prescribes the duties and responsibilities of such examiners and § 556(d) sets out the rights of the parties in the presentation of their cases before hearing examiners. Subsection 554(d) also refers to § 557 which requires examiners to make initial decisions (unless the matter is certified to the agency) and provides for appeals to the agency from examiners' initial decisions leading to a final agency order.

The statutory scheme of the A.P.A. is that a § 554 proceeding is *quasi judicial* in nature since it is an adjudication leading to final agency action. Moreover, the initial hearing contemplated by this section is the

initiation of a proceeding which, without further evidentiary proceedings, leads to final agency action and an appealable order subject to judicial review. Thus, it is clear that the Court of Appeals' holding that § 10(k) proceedings are adjudications within the meaning of § 554 of the A.P.A., if allowed to stand by this Court, leads to a twofold result. First, all § 10(k) determinations must henceforth be conducted by hearing examiners, now known as administrative law judges. Second, the determination of jurisdictional disputes by the Board will result in what the Court of Appeals deems to be final agency orders, directly appealable to courts of appeals, without the Board having made a decision on the merits of an alleged unfair labor practice under § 8(b)(4)(D).

It is submitted that the decision of the Court of Appeals is erroneous since it is contrary to the legislative intent of the Administrative Procedure Act as well as the Labor Management Relations Act. Support for this position is found not only in decisions of this Court in *N.L.R.B.* v. *Plasterers' Union No. 79*, 404 U.S. 116 (1971) and the District of Columbia Circuit in *Bricklayers, Masons & Plasterers International Union of America* v. *N.L.R.B.*, 475 F.2d 1316 (C.A.D.C., 1973), but also in the legislative histories of both statutes.

Legislative History Of The A.P.A. Shows That Adjudicative eHarings Under § 554 Are Limited To Accusatory Proceedings Involving A Prosecution.

The question of statutory interpretation before the Court is whether a § 10(k) determination is such an "adjudication required by statute [L.M.R.A.] to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved—. . . (6) the certification of worker representatives" (§ 554 (a)(6)). A literal reading of § 10(k) does not provide a conclusive answer for it simply states in relevant part that:

> "[T]he Board is empowered and directed to hear and determine the dispute . . ."

Standing alone it is unclear from this quoted portion of § 10(k) whether Congress has directed a determination of the jurisdictional dispute on the record after opportunity for agency hearing.[1] A proper resolution of the question will, therefore, require resort to the legislative intent of both the A.P.A. and L.M.R.A., as determined by the congressional purpose for the enactment of both statutes as a whole and the legislative intent regarding particular provisions of those statutes.

The Administrative Procedure Act was drafted for the specific purpose of classifying the activities of administrative agencies, providing basic procedures for the conduct of those activities, and establishing provisions for judicial review of agency orders. The legislation was purposefuly drafted on a functional approach, not specifying any particular agency or naming any specialized agency process. The Report of the House Committee on the Judiciary contains the following explanation:

> "Functional classifications and exemptions have been made, but in no part of the bill is any agency exempted by name. The bill is meant to be operative 'across the board' in accordance with its terms, or not at all. Where one agency has been able to demonstrate that it should be exempted, all like agencies have been exempted in general terms. (See sec. 2(a)). Where an agency has shown that some par-

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[1] *Compare, United States* v. *Florida East Coast R. Co.*, 410 U.S. 224 (1973) and *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972), wherein this Court decided that § 556 and §557 of the A.P.A. were not applicable to a certain class of Interstate Commerce Commission rule-makings even though the Interstate Commerce Act provided for such rule-making "after hearing". The Court reasoned that because the language did not specifically contain the phrase "on the record after opportunity for agency hearing", that Congress had not intended § 556 and § 557 to apply.

> ticular operation should be exempted from any particular requirement, the same function in all agencies has been exempted." (Senate Judiciary Comm., The A.P.A. LEGISLATIVE HISTORY, H.R.Rep. No. 1980, 79th Cong., 2nd Sess., at 250, (1946) (hereinafter cited as The A.P.A. LEGISLATIVE HISTORY)).

Senator McCarran, the Chairman of the Senate Judiciary Committee, reported the bill (S. 7) out of his committee to the Senate and stated the general purpose and intent of the legislation as follows:

> "I cannot emphasize too strongly that the bill now before the Senate is not a specification of the details of administrative procedure. Neither is it a codification of administrative law. It represents, instead, an outline of minimum basic essentials, framed out of long consideration and in the light of the comprehensive studies I have previously mentioned.
>
> To state it simply, this bill is designed to afford parties affected by administrative powers a means of knowing what their rights are, and how they may be protected. At the same time, administrators are provided with a simple course to follow in making administrative determinations. The jurisdiction of the courts is clearly stated. The bill thus provides for public information, administrative operation, and judicial review." (93 Cong. Rec. 2151) (1946).

The statute reflects an effort to classify all agency action into two (2) types—legislative (or rule-making) and adjudicative—even though some particular agency actions were not amenable for classification into either category. Consequently, functional exemptions, such as the exclusion of "the certification of worker representatives" were carved out of the class of "adjudications" (§ 554(a)(6)).

Section 551(7) defines adjudication as "agency process for the formulation of an order." Order is defined as

"the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making, but including licensing;" (§ 551(6)). Construing these two definitions together, an adjudication is literally any agency process for the formulation of a final disposition of a matter other than rule-making. These conclusionary definitions, however, do not, standing by themselves, adequately describe the kinds of proceedings which Congress set out to define as adjudications, for as the Senate Judiciary Committee Report stated:

> "The definitions in Section 2 are important, but they do not indicate the scope of the bill since the subsequent provisions make many functional distinctions and exceptions." (The A.P.A. LEGISLATIVE HISTORY, at 194).

Further statements from the legislative history disclose that the term adjudication was intended by Congress to encompass only accusatory proceedings against a person charged with violating a statutory proscription. Carl McFarland, a member of the Attorney General's Committee which initially drafted and proposed legislation leading to the Administrative Procedure Act, made this very clear in his testimony before the Senate Judiciary Committee. In reference to § 554 he said:

> "Now, to repeat, there are two kinds of administrative operations, the legislative operation called rule making which we have discussed, and *adjudication which is sometimes called an accusatory procedure.* That is a procedure where an agency comes forward and points its finger to a given person or to a company and says, 'You have sinned and we will proceed to try you'." (The A.P.A. LEGISLATIVE HISTORY, at 78) (emphasis added).

The Senate Judiciary Committee accepted McFarland's view that the term "adjudication" as used in § 554(a)

relates only to an accusatory proceeding. A Senate Judiciary Committee print contained the following statement concerning the reason for including subsection (d) in § 554:

> " 'The first sentence of subsection (c)[2] is designed to assure, in so-called 'accusatory' proceedings, that those who hear the case shall participate in its decision'." (*Id.* at 24).

In the same print the Senate Committee further indicated that § 554 contemplated accusatory proceedings because it would include a prosecutorial function, completely divorced from the adjudicative function. Thus, the Senate Judiciary Committee's print includes the following explanation of its reasons for subsection 554(d):

> " 'The remainder of the subsection, [referring to everything following the first sentence] in such cases, is designed to achieve an 'internal' segregation of deciding and prosecuting functions. The minority of the Attorney General's Committee took the position that there should be a complete separation of functions—that is, that hearings should be held and decisions made by an administrative tribunal separate from the agency engaged in investigations and prosecutions, or by a court. (Final Report, pp 203-209). The majority however, took the position that, while 'a man who has buried himself in one side of an issue is disabled from bringing to its decision that dispassionate judgment which Anglo-American tradition demands of officials who decide questions' and the 'commingling of functions of investigation or advocacy with the function of deciding are . . . plainly undesirable,' the situation could and should be remedied by appropriate internal division of labor.' " (*Id.* at 24-25).

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[2] This subsection in the Bill became subsection (d) of Section 554 as finally passed.

Later in its report the Senate Committee reiterated its intention that § 554(d) is not only intended to separate prosecutorial and adjudicative functions, but also contemplates a prosecutor in adjudicative hearings covered by § 554(a). The Report states:

> "The gist of the subsection [554(d)] is that no investigating or prosecuting officer shall directly or indirectly in any manner influence or control the operations of hearing and deciding officers, except as a participant in public proceedings and even then in no different fashion then the private parties or their representatives." (*Id.* at 203).

The legislative history of the A.P.A. on the House side also manifests an intent that § 554 involved an accusatory proceeding wherein someone is prosecuted for a statutory violation, and that such prosecution is intended to be separate from the decisional function. During House debates, Congressman Gwynne, a member of the House Judiciary Subcommittee, commenting on S. 7 and referring to subsection 554(d) said:

> "An important feature of the bill in this connection has to do with the appointment of examiners and there is a provision to keep the deciding functions separate and distinct from the prosecution part of it. Great complaint has been made that agencies send out people to prosecute the individual and, from the same office and subject to the same direction, they send out the hearing examiner who is to hear the case. This provides for separation of these functions and prohibits one from meddling with the other." (93 Cong. Rec. 5656) (1946).

In the same debate Congressman Robison made the following comment, consistent with that of his colleague:

> "This bill recognizes the principles on which our three branches of government are based so that the prosecutor may not get up the evidence, prosecute

the case, and, at the same time, decide the case." (93 Cong. Rec. 5660) (1946).

It is clear from the foregoing excerpts from Congress' deliberations on the A.P.A. in 1946, that the term adjudication was intended to apply only to accusatory proceedings involving a prosecution. The pivotal point of this case is, of course, the nature of the proceedings governed by § 554. An examination below of the legislative history of § 10(k) and related provisions passed in 1947, as amendments to the National Labor Relations Act, discloses that Congress did not intend § 10(k) proceedings to be adjudications within the meaning of § 554. That history reveals, rather, that Congress deemed § 10(k) proceedings to be preliminary, investigative, non-accusatory proceedings without the presence of a prosecuting officer.[3]

The Congressional Purpose For Enacting § 10(k) Was To Avoid A § 554 Accusatory Proceeding.

Section 10(k) empowers and directs the Board "to hear and determine" jurisdictional disputes, "unless, within ten days after notice that such charge has been

[3] Section 101.33 of the Board's Statements of Proceedure (29 CFR § 101.33) indicates that the only parties to a 10(k) proceeding are "parties to the dispute out of which the unfair labor practice is said to have arisen." No provision is made in § 10(k) for the Board's prosecutor, its General Counsel, to appear in 10(k) hearings. Moreover, the Board has recognized its General Counsel plays no role in 10(k) proceedings for in § 102.90 (29 CFR 102.90) and §§ 102.64 through 102.68 (29 CFR §§ 102.64-102.68) of its Rules and Regulations he is not mentioned. Furthermore, this Court, in *N.L.R.B. v. Plasterers' Union No. 79*, 404 U.S. 116, (1971) held that the proper parties in a 10(k) proceding include the unions vying for disputed work as well as affected employers. Conversely, § 101.10 (29 CFR § 101.10) of the Board's Statements of Procedure which references unfair labor practice hearings under § 10(b), describes the role of its prosecutor as follows: "The Government's case is conducted by an attorney attached to the Board's regional office, who has the responsibility of presenting the evidence in support of the complaint."

filed, the parties to such dispute shall submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed."

Section 10(k) was added to the legislation in the Senate. No comparable provision had been included in the original House bill, H.R. 3020 (H.R. Rep. No. 510 on H.R. 3020, 80th Cong. 1st Sess. 57 (1947)). The Senate Committee on Labor and Public Welfare stated the reason for its inclusion was the Committee's conviction that "additional procedures," especially in jurisdictional disputes, were needed, going beyond provisions defining union unfair labor practices. The Committee stated that these additional procedures "must be made available under the National Labor Relations Act in order to adequately protect the public welfare which is inextricably involved in labor disputes." (S.Rep. No. 105 on S.1126, 80th Cong., 1st Sess. 8 (1947)).

In order to adequately protect the public from what this Court has called "the economic havoc of jurisdictional strikes," *N.L.R.B.* v. *Plasterers' Union, supra* at 128, the Senate Committee said it had included the additional procedures of § 10(k) because "[t]ime is usually of the essence in these matters" (S.Rep. No. 105, at 8). Thus it provided for what it clearly intended to be a preliminary additional procedure for resolving jurisdictional disputes, other than the unfair labor practice procedure under § 8(b)(4)(D). The reason for providing these additional means was Congress' great concern for the expeditious resolution of jurisdictional disputes, rather than leaving their resolution to more time consuming unfair labor practice proceedings. The Committee Report explained:

> "Time is usually of the essence in these matters, and consequently the relatively slow procedure of the Board hearing and order, followed many months later by an enforcement decree of the circuit court of appeals, falls short of achieving the desired objectives—the prompt elimination of the obstructions to the free flow of commerce and encouragement of the practice and procedure of free and private collective bargaining." (*Id.* at 8).

Not only did the Senate add § 10(k) as one of the "additional procedures" beyond the provisions defining union unfair labor practices, it also added § 10(j) and § 10(l), authorizing the Board to seek in district courts injunctive relief against jurisdictional strikes, pending its adjudication of claimed violations of § 8(b)(4)(D). The Senate Committee's Report states that these ancillary injunctive relief provisions were included due to the same consideration, namely urgency in stopping jurisdictional strikes, which led it to include § 10(k). Its comment on these additional procedures reads as follows:

> "[W]e have provided that the Board, acting in the public interest and not in vindication of purely private rights, may seek injunctive relief in the case of all types of unfair labor practices and that it shall also seek such relief in the case of strikes and boycotts defined as unfair labor practices." (*Id.* at 8).

The foregoing taken from the legislative history of the 1947 amendments to the N.L.R.A. clearly shows that § 10(k) was only one of a number of "additional procedures", designed by Congress as a preliminary means, ancillary to § 10(b) unfair labor practice hearings, designed to eliminate, as expeditiously as possible, the harm to the public interest caused by jurisdictional strikes. In devising this truncated procedure Congress deliberately reserved for unfair labor practice hearings,

adjudications on the merits of alleged violations of § 8 (b) (4) (D). It is only in unfair labor practice hearings under § 10(b) that the prosecution—and hence an adjudication—takes place. In such hearings the Board's General Counsel, pursuant to § 3(d) of the Act exercises his authority "in respect of the prosecution of [unfair labor practice] complaints."

The legislative history of the enactment of § 10(k) clearly demonstrates that Congress sought to achieve a twofold purpose—that the Board would resolve which union should perform the work prior to any unfair labor practice proceeding, and that such resolution would be accomplished quickly. Congress was aware of the "regular procedure of the Board for hearing and judicial enforcement" (93 Cong. Rec. 1846) (1946) which necessitated an accusatory proceeding leading to an order of the Board, and purposefully chose that such disputes would be resolved in an ancillary, non-accusatory proceeding which did not result in an order of the Board. An adjudication must await the subsequent issuance of a complaint triggering a § 10(b) hearing wherein an allegation of a violation of 8(b)(4)(D) is urged by a prosecuting officer. It is this latter proceeding which constitutes an adjudication within the meaning of § 554.

The non-binding, preliminary hallmarks of a § 10(k) proceeding are illustrated by the language of the statute. There is a different quantum of proof required under § 10(k) and § 10(b). In the former the standard of proof is "reasonable cause to believe" a charge alleging a violation of 8(b)(4)(D) is true, and in the latter the standard of proof is that such charge must be established by a "preponderance of the testimony" (§ 10(c)). This Court recognized this significant distinction in *N.L.R.B.* v. *Plasterers' Union, supra.* Justice White, addressing the different burdens of proof in these two types of proceedings, observed at footnote 10 on page 122 that:

> "[T]o exercise its powers under § 10(k), the Board need only find that there is reasonable cause to believe that a § 8(b)(4)(D) violation has occurred, while in the § 8(b)(4)(D) proceeding itself the Board must find by a preponderance of the evidence that the picketing union has violated § 8(b)(4)(D)."

It can be thus be inferred that Congress, by providing for a lesser quantum of proof in § 10(k) hearings than that required in a § 10(b) unfair labor practice hearing, manifested an intent that the former type hearing is merely a preliminary, ancillary proceeding which does not, without an additional evidentiary hearing of a different nature, lead to a final agency determination and order—the essential element of a § 554 adjudication according to the legislative history of the A.P.A.

Mr. Justice White, writing for the Court in *Plasterers'*, succinctly pointed out the preliminary and non-adjudicatory nature of § 10(k):

> "The § 10(k) determination is not binding as such even on the striking union. If that union continues to picket despite an adverse 10(k) decision, the Board must prove the union guilty of a § 8(b)(4)(D) violation before a cease-and-desist order can issue. The findings and conclusions in a 10(k) proceeding are not *res judicata* on the unfair labor practice issue in the later § 8(b)(4)(D) determination [citations omitted]. Both parties may put in new evidence at the § 8(b)(4)(D) stage. . ." (*Id.* at 122 n.10).

From the Court's perception of § 10(k) proceedings referenced in *Plasterers'*, it is but a short distance to the ultimate conclusion we urge herein, namely, that such a proceeding does not constitute an adjudication within the meaning of § 554. In order to reach this conclusion, resort again to the legislative history is helpful. Congress established a *quasi-judicial* administrative system, which

(1) leads from an evidentiary hearing; (2) to initial decision; (3) to final agency determination resulting in a final judicially reviewable order. Congress intended that the type of proceeding envisioned by § 554 was limited to that in which the evidence presented at *one hearing* (not in additional hearings) would result in an order imposing a sanction,[4] as in other prosecutions wherein there is an adjudication of guilt.

As noted above, this Court has recognized that a § 10(k) determination binds no one.

> "But the § 10(k) decision standing alone, binds no one. No cease and desist order against either union or employer results from such a proceeding; . . . Neither the employer nor the employees to whom he has assigned the work are legally bound to observe the § 10(k) decision." (404 U.S. at 126-127) (footnote omitted).

It logically follows from what this Court has said, that a § 10(k) determination is not a process for the formulation of an order and thus it does not constitute an adjudication within the meaning of § 554. Reference again to the legislative history of § 10(k) is helpful.

The Senate version of § 10(k) in S. 1126 also contained an amendment offered by Senator Morse for the Board's appointment of an arbitrator to hear the merits of

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[4] In *N.L.R.B.* v. *Radio and Television Broadcast Engineers Union*, 364 U.S. 573, 576-577 (1961), this Court noted it was Congress' intent in passing § 10(k) to avoid sanctions following unfair labor practice proceedings: The Court said at pp. 576-577:

> "[W]hen Congress created this new type of unfair labor practice by enacting § 8(b)(4)(D) as part of the Taft-Hartley Act in 1947, it also added § 10(k) to the Act. Section 10(k), set out below, quite plainly emphasizes the belief of Congress that it is more important to industrial peace that jurisdictional disputes be settled permanently than it is that unfair labor practice sanctions for jurisdictional strikes be imposed upon unions."

jurisdictional disputes, within ten (10) days of the service of notice of the filing of a charge. In offering such an amendment, he too had expressed the view that in jurisdictional disputes time is of the essence, "and the regular procedure of the Board for hearing and judicial enforcement did not remedy the evil sought to be corrected" (93 Cong. Rec. 1846) (1946). The Senate Committee accepted the amendment of Senator Morse and also added the following as the last sentence in the original Senate version of § 10(k):

> "The award of an arbitrator shall be deemed a final order of the Board" (S.Rep.No. 105 on S.1126, supra, at 8).

The Senate Committee in referring to its acceptance of the Morse Amendment and the foregoing sentence said in its Report:

> "[W]e have provided that the Board shall be authorized to appoint arbitrators to hear and determine jurisdictional disputes concerning work tasks, if the parties fail to adjust the disputes within ten (10) days. Pursuant to this authorization, arbitration awards are to have the same force as final orders of the Board." (*Id.* at 8).

In the following excerpt from its Report, the Senate Committee further amplified the final order and appealable status of an arbitration award in jurisdictional disputes:

> "Finally, the award of the arbitrator is given the same status and force as a final order of the Board, a provision which will avoid the necessity of the Board hearing the dispute if it has designated an arbitrator for that purpose and also *will permit the Board to seek enforcement of the award without further proceedings.*" (*Id.* at 27) (emphasis added).

When S. 1126 was submitted to joint conference, however, both Senator Morse's arbitrator appointment pro-

vision as well as the final order language added by the Senate Committee, were omitted (H.R.Rep. No. 510 on H.R. 3020, supra, at 57). As this Court noted at page 129 of its opinion in *N.L.R.B.* v. *Plasterers' Union, supra*—this was done without explanation. However, the reasons for deletion of the provision can fairly be determined from a consideration of Congress' purpose in enacting § 8(b)(4)(D), § 10(k), § 10(j) and § 10(l).

The reasons for the Senate's retreat from including arbitration under § 10(k) and making awards final orders, while not appearing in the legislative history, are nevertheless patent from considering the overall purpose of the 1947 Amendments. Both Houses of Congress were concerned with adopting means for quickly stopping jurisdictional strikes. The Senate's original concern in inserting § 10(k) into the legislation and the reasons for it expressed in the Senate Committee Report for providing arbitration having the effect of a final order, was that it was initially believed, at least in the Senate, that a final arbitral award was necessary in order to achieve this objective without awaiting the traditional and time consuming procedures of the Board under the unfair labor practice provisions. With respect to its reasons for the inclusion of final and binding arbitration, the Senate referred to "the relatively slow procedure of Board hearing and order, followed many months later by an enforcing decree of the circuit court of appeals" (S.Rep. No. 105 on S. 1126, supra, at 8). However, with the passage of §§ 10(j) and (l) providing for ancillary injunctive relief from jurisdictional strikes and designed to maintain the *status quo ante* while the Board, through its unfair labor practice proceeding determines, in due course, alleged violations of 8(b)(4)(D), the Senate was obviously convinced by House conferees that interim arbitration, having the effect of a final appealable order, was superfluous. In other words, deletion of the arbitration

and final order provisions from the Act as passed, manifests a Congressional intent that § 10(k) determinations do not constitute final appealable orders contemplated by the A.P.A. The decision of the Seventh Circuit below, has in effect written into the statute the finality of § 10 (k) determinations, which Congress deliberately omitted as being superfluous in view of the injunctive remedies available under § 10(l).

Section 10(k) Proceedings Are Analogous To § 9 Representation Proceedings.

At the time Congress enacted the A.P.A. in 1946, the Board engaged in two (2) non-rule making activities—the resolution of questions concerning representation under § 9 of the N.L.R.A. and the prevention of unfair labor practices under § 8. The two (2), however, are quite different in character, as is clearly demonstrable from the language and structure of the statute. This Court held in *American Federation of Labor* v. *NLRB*, 308 U.S. 401 (1940), that unfair labor practice proceedings result in an "order" reviewable by courts of appeals, but that certifications in representation proceedings are not reviewable orders. In its opinion, this Court noted Congress' deep concern that representation proceedings not be delayed by judicial review of the Board's representation determinations and concluded that:

> "The statute on its face thus indicates a purpose to limit the review afforded by § 10 to orders of the Board prohibiting unfair labor practices, a purpose and a construction which its legislative history confirms." (*Id.* at 409).

The legislative history of § 554(a)(6) of the A.P.A., excluding "the certification of worker representatives" from that statute's requirements for "adjudications", reflects the same Congressional concern for the avoidance of delay in representation cases. The Senate Judiciary

Committee stated that the basis for the exclusion was that ". . . such things as intermediate reports, findings, and written decisions are unnecessary because of the simplicity of the issues, the great number of cases, and the exceptional need for expedition." [5] (The A.P.A. LEGISLATIVE HISTORY, at 23).

The functional similarity between § 9 proceedings and § 10(k) proceedings is obvious. The purpose of a § 9 proceeding is to determine questions concerning representation of workers and the purpose of a § 10(k) proceeding is to determine which competing group of workers should perform the work.[6] While the ultimate question of representation under § 9 is generally resolved by an election, in many cases the Board must resolve disputed issues concerning the appropriateness of the bargaining unit. In such cases it hears evidence concerning the work performed by designated groups or classes of employees; bargaining history; the nature and organizational structure of the employer's business; the size of the employer's facility or facilities; as well as other relevant factors showing a community of interest among

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[5] The Attorney General's Committee on Administrative Procedure reported that "[t]he need for intermediate reports, to the extent that they provide a method for obtaining the judgment of the trial examiner on issues of fact dependent for their resolution upon the demeanor of witnesses, is rarely present in a representation proceeding. The evidentiary material relates to economic facts such as the nature of the employer's business, the duties of certain employees, and the history of collective bargaining in the plant. Issues of credibility are rarely present." (S. Doc. No. 10, 77th Cong., 1st Sess., pt. 5, at 35, n. 144 (1944)).

[6] As this Court noted in *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261, 268 (1963), there is a ". . . blurred line that often exists between work assignment disputes and controversies over which of two or more unions is the appropriate bargaining unit." If it is a work assignment dispute, then § 10(k) is operative, assuming there has been a strike or threat of a strike. If the controversy concerns which of two unions should represent the employees performing the work, a § 9 proceeding to clarify the certification is held.

employees as to their wages, hours and terms and conditions of employment.

The Board's task in a § 10(k) determination requires the same fact gathering, analysis, and application of standards and criteria, as is necessary in a § 9 proceeding.[7] The relevant factual inquiries in a jurisdictional dispute determination concern the bargaining history of one or both unions (including collective bargaining agreement); industry and area practice; relative skills of the employees; efficiency of operation; and past practices. As in the case of § 9 unit determinations, these factual matters are generally not disputed as such and the Board's determination is based upon an examination of those facts in accordance with relevant criteria.

Neither the § 10(k) determination nor the § 9 representation proceeding result in "orders" of the Board. The reasons Congress chose to exclude § 9 cases from the A.P.A. provisions relating to adjudications are the same, in part, as the reasons for which it enacted § 10 (k) one year later—i.e. (1) the desire for a relatively fast procedure for resolving questions of representation or work jurisdiction, (2) in non-accusatory proceedings, (3) with non-reviewable decisions of the Board, (4) based upon the application of pre-determined standards.[8]

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[7] In *Plasterers'*, *supra*, at 135, the Court characterized a § 10(k) proceeding as "a comparative proceeding aimed at determining which union is entitled to perform certain tasks."

[8] The House Conference Report on The Taft-Hartley Act indicates that Congress construed representational and jurisdictional questions as somewhat interlocking, as follows:

> "(19) The Senate amendment also contained a new Section 10(k) which had no counterpart in the House bill. This section would empower and direct the Board to hear and determine disputes between unions giving rise to unfair labor practices under section 8(b)(4)(D) (jurisdictional strikes). The conference agreement contains this provision of the Senate amendment, amended to omit the authority to appoint an arbitrator. If the employer's employees select as their bar-

The District of Columbia Circuit clearly recognized the functional similarities between § 9 cases and § 10 (k) proceedings and concluded that the latter were not adjudications for the same reasons as were applicable to the former (*Bricklayers, supra*, at 1319).[9] We believe the District of Columbia Circuit's analysis is correct and that it further demonstrates that Congress could not have intended that the certification of work tasks would be an adjudication if the "certification of worker representatives" was not an adjudication.

The Seventh Circuit's Decision Creates An Irreconcilable Conflict Between the L.M.R.A. And The A.P.A.

In sharp contrast to the District of Columbia Circuit's decision in *Bricklayers*, the Seventh Circuit has determined that a § 10(k) determination is an adjudication under § 554 and that the requirements of that and related sections of the A.P.A. are applicable to such proceedings. In so holding, the Seventh Circuit has completely overturned the Congressional purpose of speedily resolving jurisdictional disputes and thereby avoiding a protracted "adjudication".

Under the Seventh Circuit's decision § 10(k) determinations, which are not overly quick under the present procedure,[10] would suffer significant additional delays

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gaining agent the organization that the Board determines has jurisdiction, and if the Board certifies that union, the employer will, of course, be under the statutory duty to bargain with it." (H.R.Rep. 510 on H.R. 3020, supra, at 57).

[9] The Court's actual statement is ". . . because of the similarity between the nature of a section 9 representation proceeding and a proceeding under section 10(k). An intermediate report by the examiner is not required in the former for reasons applicable to the latter:"

[10] Over six (6) months transpired between the filing of the charge in the instant case and the Board's determination of the dispute.

because the case would first have to await assignment of an administrative law judge, then allow for time to submit proposed findings and conclusions, and finally file exceptions to the recommended decision of the administrative law judge (§ 557(c)).

Even more destructive of Congressional intent than the lengthening of the time internal to the Board's handling of a jurisdictional dispute, is the potential for drastic delays which may result from the superimposition of the A.P.A.'s definition of "adjudication" and "order" on the Board's § 10(k) decision after it is finally rendered. If the § 10(k) proceeding is an adjudication, then the jurisdictional award is an "order" rendered by the Board after a hearing conducted by an administrative law judge. That order must, under § 551(6), be a "final order" and therefore may be reviewed by a court of appeals under § 10(f) of the L.M.R.A. (29 U.S.C. § 160(f)).[11] This circumstance would create teh absurd situation of a jurisdictional "order" being enforced or set aside by a court of appeals, after which, if it were enforced, an entirely new adjudication of the unfair labor practice would result with another hearing before an administrative law judge, another "order" of the Board, and, if necessary, another review by a court of appeals.

The Seventh Circuit's decision creates an irreconcilable conflict between the language and intent of the statutory scheme for the resolution of jurisdictional disputes and the provisions of the A.P.A. While Congress has clearly provided that a jurisdictional award is not an order under the L.M.R.A., the Seventh Circuit has held, in

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[11] That section provides in part that "[a]ny person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business. . .".

effect, that it is an order under the A.P.A. Under long-standing principles of statutory construction applied by this Court, the Seventh Circuit's construction of these statutes cannot be allowed to stand.

In *Sorrells* v. *United States*, 287 U.S. 435, 446 (1932), the Court stated that:

> "Literal interpretation of status at the expense of the reason of the law and producing absurd consequences or flagrant injustice has frequently been condemned."

In *Armstrong Co.* v. *Nu-Enamel Corp.*, 305 U.S. 315, 333 (1938) the Court noted that the construction of statutes "so as to avoid results glaringly absurd, has long been a judicial function". *See, also, United States* v. *American Trucking Ass'n.*, 310 U.S. 534, 543 (1940), wherein the Court stated:

> "When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words." (footnotes omitted);

and *Southland Co.* v. *Bayley*, 319 U.S. 44, 47 (1943),

> "The problem of statutory construction posed by this conflict of circuits should not be solved simply by a literal reading of the exemption section of the Fair Labor Standards Act and the delegation of power section of the Motor Carrier Act. Both sections are parts of important general statutes and their particular language should be construed in the light of the purposes which led to the enactment of the entire legislation."

The Seventh Circuit's decision has applied the literal definition of adjudication in the A.P.A. to § 10(k) pro-

ceedings, clearly producing an absurd result which is not mandated by the policy and intent of the A.P.A. and which is completely contrary to the policy and intent of the L.M.R.A.'s procedures for the expeditious resolution of jurisdictional disputes.

The Board's Long-Standing And Consistent Treatment Of § 10(k) Determinations As Non-Adjudicatory Is Entitled To Great Weight.

From the time § 10(k) was enacted in 1947, the Board has consistently conducted § 10(k) proceedings in the same manner as it has conducted § 9 proceedings—i.e., with hearing officers rather than independent trial examiners, without proposed findings, and without exceptions. As early as 1949, specific challenge to the Board's § 10(k) procedure as violative of provisions of the A.P.A. relating to adjudications was raised and the Board stated as follows:

> "The Respondents assert that Section 8 [§ 557] of the Administrative Procedure Act applies to a proceeding under Section 10(k) of the National Labor Relations Act, as amended. We do not agree. Under Section 202.32 of the Board's Rules and Regulations —Series 5, as amended, the hearing under Section 10(k) is non-adversary in character, and, according to the procedure adopted therefor, conducted in the same way as a hearing in a representative proceeding. The Board adopted such procedure because the decision in the proceedings under Section 10(k) is a preliminary administrative determination made for the purpose of attempting to resolve a dispute within the meaning of that section; the unfair labor practice itself is litigated at a subsequent hearing before a Trial Examiner in the event the dispute remains unresolved. It is to the subsequent adversary hearing, which leads to a final Board adjudication, that Section 8 of the Administrative Procedure Act applies."

(*Marine Cooks & Stewards (Irwin-Lyons Lumber Co.)*, 83 NLRB 341, 341 (1949)).

To the same effect is the Board's holding in *International Longshoremen's & Warehousemen's Union (General Ore, Inc.)*, 124 NLRB 626 (1959).

The Board's interpretation that the statutory scheme for the resolution of jurisdictional disputes is not adjudicative until unfair labor practice liability is litigated, was rendered contemporaneously with the enactment of § 10(k) and should be given great weight by this Court as a guide to statutory interpretation. In *Norwegian Nitrogen Prod. Co.* v. *United States*, 288 U.S. 294, 315 (1933), Mr. Justice Cardozo said:

> "[A]dministrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful. *United States* v. *Moore*, 95 U.S. 760, 763; *Logan* v. *Davis*, 233 U.S. 613, 627; *Brewster* v. *Gage*, 280 U.S. 327, 336; *Fawcus Machine Co.* v. *United States*, 282 U.S. 375; *Interstate Commerce Comm.* v. *New York, N.H. & H.R. Co.*, 287 U.S. 178, ante, 248. The practice has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new."

For more recent applications of this interpretive principle, see *Zemel* v. *Rusk*, 381 U.S. 1, 11 (1965), where the Court stated: "The interpretation expressly placed on a statute by those charged with its administration must be given weight by courts faced with the task of construing the statute"; and *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965), stating: "When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration."

Not only has the Board consistently treated § 10(k) proceedings as non-adjudicatory since that provision became law in 1947, but also the Board's interpretation has impliedly been accepted by courts of appeals and even this Court in past decisions construing the meaning and purpose of § 10(k), although no court has specifically passed upon this question until the District of Columbia and Seventh Circuits' 1973 decisions. The District of Columbia Circuit specifically noted in this regard that:

> "[W]e are faced with an unusually impressive administrative interpretation supporting the conclusion we reach, first adopted by the Board as long ago as 1949. . . . and until now, we believe, not questioned by courts or Congress. This interpretation of section 10(k) by the Board is entitled to great weight." (*Bricklayers*, *supra*, at 1321) (citations omitted).

The Prosecution Of The Unfair Labor Practice Case By The Same N.L.R.B. Attorney Who Presided At The Prior § 10(k) Hearing Was Not An Improper Commingling Of Prosecutorial And Decisional Functions.

There remains only the question of whether the A.P.A.'s proscriptions against the commingling of prosecutorial and decisional roles were violated "in spirit" if not in the letter of the statute because the same Board attorney conducted the § 10(k) hearing and subsequently prosecuted the § 8(b)(4)(D) complaint.[12] In this respect, the Seventh Circuit held:

> "In our case the hearing officer had the duty of hearing the evidence in the case, and subsequently urging and relying upon it as prosecutorial evidence.

---

[12] We note, in passing, that if there was a violation of the A.P.A., such spiritual violation was so ethereal as to escape the notice of Local 134 until it filed its brief to the administrative law judge, long after the Board's § 10(k) determination, and even after the close of the unfair labor practice hearing.

> We think that the knowledge on the part of the presiding officer that he will subsequently advocate a position based upon his own evidentiary rulings at the § 10(k) hearing could very well influence his decisions at that hearing. This commingling of functions is plainly inconsistent with both the spirit and the letter of the Act, and, we think, incompatible with the accepted norms for proper administration of justice." (A. 70-71).

This holding of the Seventh Circuit is premised upon several factual errors. First, the hearing officer did not play a judicial or decisional role in the § 10(k) hearing, but rather acted as an administrative fact gatherer. He shares no decisional authority with the Board but merely "prepares an analysis of the issues and the evidence" and "makes no recommendations in regard to resolution of the dispute" (29 CFR § 101.34). In *International Longshoremen's and Warehousemen's Union, supra,* at 629, the Board described the hearing officer's role as follows:

> "The primary function of the hearing officer, who is acting under delegation of authority from the Board, in a nonadversary proceeding is to insure that the record contains a full statement of pertinent facts as may be necessary for the determination of the dispute by the Board."

Secondly, the hearing officer had no knowledge that there would be a subsequent unfair labor practice proceeding. Certainly, he could not have foreseen that he would prosecute it. In fact, the Board does not ordinarily assign the same person to conduct related § 10(k) hearings and § 8(b)(4)(D) unfair labor practice cases.

The most fundamental error in the Seventh Circuit's holding is the Court's apparent concept that the hearing officer is engaged in mixed functional roles at the § 10(k) hearing itself, i.e. that he is hearing the evidence

and at the same time using that opportunity to get a running start on his prosecutorial tasks. This being the case, the Court has reasoned, the evil is within the purview of the statement of the Secretary of Labor's Committee on Administrative Procedure, The Immigration and Naturalization Service, 77 (Mimeo. 1940) quoted in part in *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 44 (1950) and also set out in the Seventh Circuit's decision (A. 69-70) as follows:

> "A genuinely impartial hearing, conducted with critical detachment, is psychologically improbable if not impossible, when the presiding officer has at once the responsibility of appraising the strength of the case and of seeking to make it as strong as possible. Nor is complete divorce between investigation and hearing possible so long as the presiding inspector has the duty himself of assembling and presenting the results of the investigation. . . ." [13]

Wong Yang Sung concerned deportation proceedings (clearly an accusatorial proceeding) conducted by the Immigration Service wherein the responsibility of the "presiding inspector" was notably prosecutorial because he had the duty to conduct the interrogation of the alien, to cross examine the alien's witnesses, and to "present such evidence as is necessary to support the charges in the warrant of arrest" (339 U.S. at 46).

We submit that the hearing officer's role in a § 10(k) hearing is completely dissimilar to that of a presiding inspector of the Immigration Service which was decried by this Court in *Wong Yang Sung* as being violative of the A.P.A. proscription against commingling. As noted previously, the § 10(k) hearing is not accusatory, and furthermore, the hearing officer is neither required nor allowed to build a case for or against either

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[13] The Seventh Circuit erroneously attributed this statement to Mr. Justice Jackson. (A. 69).

union claiming entitlement to the work in question. As this Court noted in *Plasterers'*, *supra*, note 7, the hearing is "a comparative proceeding aimed at determining which union is entitled to perform certain tasks." The hearing officer has no functional motivation to favor either union in the reception of the evidence and has no "responsibility of appraising the strength of the case" nor "of seeking to make it as strong as possible" (*Wong Yang Sung*, *supra*, at 44).

Quite clearly there was no violation of the A.P.A.'s commingling proscription in fact or spirit in this case. Indeed, Local 134 has not alleged that any facts or findings of the Board, in either the § 10(k) determination, or the unfair labor practice proceeding, demonstrated that it was prejudiced by the hearing officer's functioning as the prosecutor in this case. There is no claim of any actual impropriety or prejudice. As noted previously, Local 134 never even raised an objection.

CONCLUSION

It is respectfully submitted that the Seventh Circuit's decision holding that § 10(k) proceedings are adjudications, within the meaning of § 554 of the A.P.A., constitutes reversible error. Its sole basis for denying enforcement of the Board's Decision and Order was the finding of an improper commingling of prosecutorial and adjudicative functions. As to the merits, the Seventh Circuit found that the Board's determination of dispute and its subsequent unfair labor practice adjudication, were otherwise proper and supported by substantial evidence on the record. We therefore ask that this Court enter an order reversing the decision of the Court of Appeals and enforcing the Decision and Order of the National Labor Relations Board. In the alternative we ask that the decision be reversed as to the administrative law point, and that the case be remanded to the Seventh Circuit with instructions for the entry of an order and decree enforcing the Board's order.

Respectfully submitted,

MATTHEW E. MURRAY
JOHN D. O'BRIEN
PETER J. HURTGEN
Attorneys for Petitioner

SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON
1819 H Street, N.W.
Washington, D. C. 20006

APPENDIX

APPENDIX

LABOR MANAGEMENT RELATIONS ACT OF 1947

* * * *

§ 160. Prevention of Unfair Labor Practices

* * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any

such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, secs. 723-B, 723-C).

* * * *

(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the District Court of the United States for the District of Columbia), within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

* * * *

(l) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 8(b), or section 8(e) or section 8(b)(7), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, peti-

tion any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *Provided further*, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period: *Provided further*, That such officer or regional attorney shall not apply for any restraining order under section 8(b)(7) if a charge against the employer under section 8(a)(2) has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further*, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged n promotng or protecting the interests of employee members. The serv-

ice of legal process upon such officer or agent shall constitute service upon the labor organization and make such organizations a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8(b)(4)(D).

JUN 28 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-1313

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION, COMMUNICATIONS EQUIPMENT AND SYSTEMS DIVISION,

Petitioner,

vs.

LOCAL 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF RESPONDENT CWA IN SUPPORT OF PETITIONER.

CHARLES V. KOONS,
JEROME SCHUR,
IRVING M. FRIEDMAN,
HAROLD A. KATZ,
Attorneys for CWA.

KANE & KOONS,
1100 Seventeenth St., N. W.,
Washington, D. C. 20036,

KATZ & FRIEDMAN,
7 South Dearborn,
Chicago, Illinois 60603.

Gunthorp-Warren Printing Company, Chicago • 346-1717 56

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BRIEF OF RESPONDENT CWA IN SUPPORT OF PETITIONER.

OPINIONS BELOW.

The opinion of the Court of Appeals is reported at 486 F. 2d 863 (7th Cir. 1973), App. 63-71. The Decision and Order of the National Labor Relations Board which was reviewed by the Court of Appeals is reported at 197 NLRB No. 127 (1972); App. 51-55. The Decision and Determination of Dispute of the National Labor Relations Board, which is the Board's determination of the underlying jurisdictional dispute, is reported at 191 NLRB No. 122 (1971), App. 9-24.

JURISDICTION.

This case is before the Court pursuant to 28 U. S. C. § 1254(1), a petition for writ of certiorari having been granted by order of May 13, 1974.

QUESTIONS PRESENTED.

1. Whether the National Labor Relations Board's determination of a jurisdictional dispute under § 10(k) of the Labor Management Relations Act is a final order and consequently within the reach of § 554 of the Administrative Procedure Act.

2. Whether the hearing officer in a § 10(k) jurisdictional dispute case before the National Labor Relations Board participates or advises in the decision to such an extent that he is subject to § 554(d) of the Administrative Procedure Act.

3. Whether Local 134 waived its right to claim that § 554 (d) of the Administrative Procedure Act applied to the proceedings before the Board by failing to object to obvious departures from other sections of that Act at the outset of the § 10(k) hearing, or by failing to appeal from the Board's determination of the § 10(k) dispute.

4. Whether there was a commingling of judicial and prosecutorial functions which violated § 554(d) of the Administrative Procedure Act where an attorney acted as hearing officer in a hearing under § 10(k) of the Labor Management Relations Act, and months later was assigned to prosecute a related unfair labor practice case.

STATUTES AND REGULATIONS INVOLVED.

The following sections of the Labor Management Relations Act (LMRA), 29 U. S. C. § 151, *et seq.* (1970), are applicable to this case and are appended verbatim to this petition as Appendix 1:

§ 3(d)	29 U. S. C. § 153(d) (1970)
§ 8(b)(4)(ii)(D)	29 U. S. C. § 158(b)(4)(ii)(D) (1970)
§ 10(a)	29 U. S. C. § 160(a) (1970)
§ 10(e)	29 U. S. C. § 160(e) (1970)
§ 10(f)	29 U. S. C. § 160(f) (1970)
§ 10(j)	29 U. S. C. § 160(j) (1970)
§ 10(k)	29 U. S. C. § 160(k) (1970)
§ 10(l)	29 U. S. C. § 160(l) (1970)

The following sections of the Administrative Procedure Act (APA), 5 U. S. C. § 551, *et seq.* (1970), are applicable and are appended verbatim as Appendix 2:

§ 551(6) and (7)	5 U. S. C. § 551(6) and (7) (1970)
§ 554(d)	5 U. S. C. § 554(d) (1970)
§ 556(a) and (b)	5 U. S. C. § 556(a) and (b) (1970)

Section 101.34 of the National Labor Relations Board's Statements of Procedure, 29 C. F. R. § 101.34 (1973), is applicable to this case and is appended verbatim as Appendix 3.

STATEMENT OF THE FACTS AND OF THE CASE.

Statement of the Facts.

The Communications Equipment and Systems Division of International Telephone and Telegraph Corporation (the Employer or the Company) entered into a contract with the Village of Elk Grove, Illinois, to sell and install a private telephone system for the Elk Grove Village administration offices which were under construction.[1] The Employer subcontracted the initial phase of this work to an electrical construction company whose employees were represented by Local 134, International

1. The facts are stated here as found by the Board and by the Court of Appeals. Since Local 134 has not cross-appealed to this Court, there is no issue of fact at this time.

Brotherhood of Electrical Workers, AFL-CIO (Local 134). The bulk of the work was to be accomplished by employees of the Employer who are represented for collective bargaining purposes by the Communications Workers of America (CWA).

A business agent of Local 134 objected to this work assignment, telling officials of the Employer that Local 134 did all telephone and private switchboard installation and maintenance work in Cook County, Illinois. The business agent stated that CWA would not install telephone equipment in Cook County and that "[W]e'd better get that work or there will be trouble."

When employees of the Employer represented by CWA appeared at the job site to begin their work, the Local 134 steward and other members of Local 134 employed by other contractors left the job site and remained away from their work until the Employer agreed that no CWA employees would remain on the job. Thereafter, CWA employees were excluded from the job site. Only after the members of Local 134 had completed their work were CWA employees able to return to complete the balance of their work.

PROCEEDINGS BEFORE THE NATIONAL LABOR RELATIONS BOARD.

The Employer then filed an unfair labor practice charge alleging that Local 134 had violated Sections 8(b)(4)(i) and (ii)(D) of the National Labor Relations Act (hereafter Labor Management Relations Act or LMRA), 29 U. S. C. § 158(b)(4)(i) and (ii)(D). The gravamen of the unfair labor practice charge was that Local 134 threatened the Employer and induced employees of other, neutral employers to refuse to work for the purpose of forcing the Employer to assign particular work to members of Local 134 rather than to Company employees represented by CWA.

After investigating the charge, the Board held a hearing under § 10(k) of the LMRA. This hearing was presided over by an

attorney who was an employee of the regional office of the Board and who was designated to act as a hearing officer. Upon conclusion of the hearing the record was transferred to the Board. In accordance with practice before the Board in § 10(k) hearings, no briefs were filed with the hearing officer, but only with the Board. The Board, after receiving briefs filed by the parties, issued its detailed Decision and Determination of Dispute. App. 9. The Board awarded the disputed work to employees of the Company represented by CWA. App. 21. Thereafter a motion to reconsider was filed by Local 134 which was denied. Local 134 did not contend during any phase of the § 10(k) proceeding that the APA was applicable, nor did it raise any objection claiming a violation of the APA. Local 134 did not attempt to appeal to the Court of Appeals from the Decision and Determination of Dispute.

The second phase of the matter before the Board consisted of an unfair labor practice proceeding, based upon the original charge which had lain dormant during the § 10(k) proceedings. When Local 134 indicated that it would not abide by or accept the Board's decision in the § 10(k) proceeding, the General Counsel issued a Complaint, charging that an unfair labor practice had been committed.

The attorney assigned to represent the General Counsel and to prosecute the unfair labor practice, by chance, turned out to be the same attorney who had presided as hearing officer at the § 10(k) hearing eight months earlier. At the outset of the unfair labor practice hearing, Local 134 objected and for the first time argued that the Administrative Procedure Act (APA) applied. The objection was based solely on the grounds that the same attorney who had previously been the hearing officer in the § 10(k) hearing was now acting as prosecutor.

The unfair labor practice hearing was held before an Administrative Law Judge (then called a Trial Examiner). After briefs were submitted, the Judge determined that Local 134 had indeed committed the unfair labor practice. App. 34. On appeal, the Board affirmed. App. 51.

PROCEEDINGS IN THE COURT OF APPEALS.

Thereafter Local 134 filed a petition to review the Board's order, and the Board filed a petition seeking enforcement.

The Court of Appeals for the Seventh Circuit affirmed most of the Board's Decision. It affirmed the Board's award of the work in the § 10(k) decision:

> "Testimony at the § 10(k) hearing clearly indicates that employees represented by CWA customarily install and test equipment similar to that involved here in Cook County, and the Board determined that by area, employer, and industry practice and by skill and training, the CWA employees were more entitled to perform the disputed work than employees of Local 134." App. 66.
>
> "We certainly cannot say that the Board's decision was not supported by the controlling facts of the case." App. 68.
>
> "In these circumstances the employer was 'trapped' in a jurisdictional dispute between the two contesting unions. Stated another way, the Local 134 activities complained of did not involve a primary dispute with the employer over fulfillment of its contract for work customarily performed, but were secondary pressures designed to influence the employer concerning a jurisdictional union dispute. Such is the very activity § 8(G)(4)(D)(b)(4)(D) was intended to prohibit." App. 67-68.

Even though it agreed that Local 134 had violated the Act, the Court of Appeals denied enforcement of the Board's decision. The court concluded that, because the hearing officer in the § 10(k) proceeding subsequently served in a prosecutorial capacity at the § 8 unfair labor practice hearing, there was a violation of § 5(d) of the APA. 5 U. S. C. § 554(d). On this basis the court denied enforcement of the Board's order.

SUMMARY OF ARGUMENT.

Congress sought to regulate jurisdictional disputes by enacting § 10(k) of the Labor Management Relations Act. Under the scheme of the Act, there is no provision for immediate enforcement of the Board's decision in a § 10(k) proceeding. The only way to implement the § 10(k) decision is through an unfair labor practice hearing, after which, as here, the Board may seek enforcement or any party may seek to review the Board's order. Consequently, the § 10(k) decision is not final. If it is not final, it is not, by definition, an adjudication under the Administrative Procedure Act, and § 554(d) of the APA does not apply. Since the court below relied upon § 554(d)'s proscription against commingling of judicial and prosecutorial functions, its refusal to enforce the Board's order was error.

A further reason why § 554 of the APA does not apply to the hearing officer in a § 10(k) proceeding is because he merely presides over a non-adversary, fact-gathering hearing. He does not participate in or advise in the decision of the Board. Consequently his function is not regulated by § 554(d) of the APA which by its terms affects only prosecutors who participate or advise in the decision. In the present case the Board alone determined the jurisdictional dispute; the hearing officer did not in any way participate in the decision or advise the Board.

If the court below is upheld, then the settlement of jurisdictional disputes would be delayed, in contravention of the desire of Congress to expedite such settlements. The APA applies only if the § 10(k) decision is a final one. But, if it is final, an appeal would have to be allowed at that point, pursuant to § 10(f) of the LMRA. This would allow not one but two appeals to a disappointed party, thereby greatly delaying conclusion of the jurisdictional dispute.

Local 134 has waived its right to assert that the proceedings below were governed by the APA, since Local 134 did not object at the time of the § 10(k) hearing on the grounds that

the hearing officer was not an Administrative Law Judge and on the grounds of other departures from the APA (§§ 556, 557). Also Local 134 did not appeal from the Board's § 10(k) decision, which it had a right to do if the decision was final, as now claimed.

Even if we assume, *arguendo*, that § 554(d) of the APA applies and prevents a person who operates on the level of a § 10(k) hearing officer from also performing prosecutorial functions, Local 134 was not prejudiced. Since the hearing officer at the time of the § 10(k) hearing did not know that he would later be a prosecutor, his role as hearing officer or judge was impartial. The APA seeks to guarantee an impartial judge, not to regulate prosecutors. Since the hearing officer here was impartial, there was no prejudice to Local 134 and no reason to deny enforcement of the Board's order.

ARGUMENT.

I. Since the Board's § 10(k) Determination Was Not Final, It Was Not an Adjudication, and, Therefore, § 554 of the APA Does Not Apply.

The Court of Appeals agreed with the Board that Local 134 had violated the Act, but the court refused to enforce the Board's order on a highly technical ground based upon a misreading of the Administrative Procedure Act. The Court of Appeals relied upon a crucial but unwarranted assumption:

> "It is apparently admitted that § 554 [of the APA] applies to [LMRA] § 10(k) hearings." App. 70.

This assumption was crucial, because it largely decided the case. It was unwarranted, because neither the Employer, the Board, nor CWA had ever made this admission. Although these three parties called this mistake to the court's attention by filing petitions for rehearing, the petitions were denied without further opinion. This issue is too important to be decided by an admission which was never made.

Section 554 of the APA does not apply to all agency proceedings. It only "applies, according to the provisions thereof, in every case of adjudication. . . ." 5 U.S.C. § 554(a) (1970). An adjudication is defined as agency process for the whole or a part of a "final disposition." APA § 551(6), (7). It is clear, however, that the § 10(k) decision under the LMRA is not a final disposition. This Court explicitly pointed this out in *NLRB* v. *Plasterers Union No. 79*, 404 U.S. 116 (1971):

> "But the § 10(k) decision standing alone, binds no one. No cease-and-desist order against either union or employer results from such a proceeding. . . ." 404 U.S. at 126.

Obviously, if the § 10(k) decision binds no one, it is not a final decision and not an "adjudication" that would be subject to the APA. Nevertheless, the Court of Appeals, while acknowledging this Court's language in the *Plasterers* case, proceeded to brush it aside in order to arrive at the erroneous conclusion that § 554 is applicable to a § 10(k) proceeding. The Court of Appeals, notwithstanding this Court's language, thought it "an over-simplification to say that the § 10(k) hearing has no binding effect." App. 69. This is a play on words. A decision that binds no one cannot have significant binding effect. More important, a decision that binds no one should not be considered final under the APA.

A decision which is directly contrary to that of the court below was reached in *Bricklayers, Masons and Plasterers* v. *NLRB*, 475 F.2d 1316 (D.C. Cir. 1973), where, in a carefully reasoned decision, the United States Court of Appeals for the District of Columbia held "that a determination in a Section 10(k) proceeding is not an adjudication within the meaning of 5 U.S.C. Section 544." 475 F.2d at 1318-19. The applicability of the APA was the major point at issue there, and the opinion of the District of Columbia Circuit is devoted almost entirely to analyzing this problem and concluding that the APA does not apply. By contrast, the Seventh Circuit in the case at bar assumed incorrectly that this crucial point was "admitted."

The District of Columbia Circuit expressly held that even though a factual question is resolved, the § 10(k) decision is not final.

> "The scheme for and consequence of a Section 10(k) hearing thus are not adjudicatory, notwithstanding that in reaching its determination the Board resolves a factual issue. That may be the case also in a Section 9 representation proceeding but would not for that reason require an intermediate report of the hearing officer, even were such a certification not explicitly excepted from Section 554 of the A.P.A." *Id.*, at 1321.

Clearly a § 10(k) decision is not an adjudication and, therefore, does not fall within the scope of the APA.

The § 10(k) decision "binds no one." *NLRB* v. *Plasterers Union No. 79, supra,* at 126. It does not result in a cease and desist order. "Neither the employer nor the employees to whom he has assigned the work are legally bound to observe the § 10(k) decision . . ." *Id.* at 127. The "impact of the § 10(k) decision is felt in the" unfair labor practice proceeding. *Id.* at 126. "This is the design of the Act; Congress provided no other way to implement the Board's § 10(k) decision." *Id.* at 127.[1] A decision which binds no one, whose impact is not felt until an entirely separate proceeding and a subsequent decision in such a proceeding, and which cannot itself be implemented, is not final. As it was not final, § 554 of the APA did not apply and it was not violated. Clearly, in resolving the conflict between the Seventh Circuit and the District of Columbia Circuit, this Court should uphold the District of Columbia, as its decision rests upon a firm foundation of correct statutory

1. The absence of any enforcement procedure indicates that the § 10(k) determination is not final. Like the § 10(k) hearing, a public hearing called by the Secretary of HEW under the Clean Air Act, 24 U.S.C.A. § 1857d(h), does not result in any sanctions for failure to comply with the Board's order. Consequently it has been held that such a hearing is not an "adjudication" subject to the APA. *U.S.* v. *Bishop Processing Co.*, 287 F. Supp. 624 (D. Md. 1968).

construction and greater understanding of the statutory scheme of Congress for the resolution of jurisdictional disputes.

II. Even if, Arguendo, § 554(d) of the APA Applied, It Was Not Violated Because the Hearing Officer Below Did Not Participate or Advise in the Decision.

A. The Board, Not the Hearing Officer, Decided the Case. This Was in Accordance with Board Rules and Long-Established Precedent.

Section 554(d), relied on by the court below, states that an agency employee who performs prosecuting functions may not also ". . . participate or advise in the decision, recommended decision, or agency review . . ." 5 U.S.C. § 554(d) (1970). This language does not apply to a § 10(k) hearing officer, since he does not participate or advise in the Board's decision.

The Board's rules state:

> "Sec. 101.34 Hearing—If the parties have not adjusted the dispute or agreed upon methods of voluntary adjustment, a hearing, usually open to the public, is held before a hearing officer. The hearing is *nonadversary* in character, and the *primary interest of the hearing officer is to insure that the record contains as full a statement of the pertinent facts as may be necessary for a determination of the issues by the Board.* All parties are afforded full opportunity to present their respective positions and to produce evidence in support of their contentions. The parties are permitted to argue orally on the record before the hearing officer. At the close of the hearing, the case is transmitted *to the Board for decision.* The hearing officer prepares an analysis of the issues and the evidence, *but makes no recommendations* in regard to resolution of the dispute." (emphasis added.) 29 C.F.R. 101.34 (1973).

The Board has consistently defined the role of the hearing officer so as to preclude his recommending, participating in, or advising in the § 10(k) decision. For instance, the Board stated:

> "The hearing under Section 10(k) is *non-adversary* in character and conducted in the same manner as a hearing in a representation proceeding. The *primary interest* of the hearing officer, who is acting under the delegation of authority from the Board, is *to insure that the record contains as full a statement of pertinent facts*, as may be necessary for a determination by the Board. *The hearing officer makes no recommendation* in regard to resolution of the dispute, and the charged unions in this case do not refer to any particular ruling of the hearing officer whereby they were prejudiced." (emphasis added). *Local No. 27, International Typographical Union*, 121 NLRB 1013, 1015-1016 (1958).

To the same effect is *National Union of Marine Cooks and Stewards (Irwin-Lyons Lumber Co.)*, 83 NLRB 341, 24 LRRM 1089 (1949).

In *International Longshoremen's & Warehousemen's Union, Local 8 (General Ore, Inc.)*, 124 NLRB 626, 44 LRRM 1445 (1959), the Board reiterated the circumscribed duties of the hearing officer. The Board there noted in reference to another provision of the APA that "it is well established that Section 8 of the Administrative Procedure Act . . . does not apply to a proceeding under § 10(k)." 124 NLRB at 628, 44 LRRM at 1449. The Board described the limited authority of a hearing officer in these words:

> "However, a hearing officer's report in a 10(k) proceeding, as in all representation cases, is in the nature of an interoffice memo and is part of the Board's confidential files. As mentioned before, a hearing officer report contains no recommendations as to the disposition of the issues, nor is it intended to dispense with the independent review by the Board of all the evidence admitted at the hearing, or with the determination by the Board of all the issues raised by the parties at the hearing and in their briefs to the Board. Under Sections 9(c) and 10(k) of the Act, no such responsibility is imposed upon the Hearing Officer, but it is laid upon the Board." 124 NLRB at 629, 44 LRRM at 1449.

It is thus apparent that the hearing officer does not "participate or advise in the decision, recommended decision, or agency review" and that consequently § 554 of the APA does not apply.

The Board's policy is to utilize a hearing officer to preside over a non-adversary, fact-gathering hearing. But the Board itself makes the § 10(k) decision. This is in accord with the legislative aim:

> "But administrative agencies are frequently given rather loosely defined powers to cope with problems as difficult as those posed by jurisdictional disputes and strikes. . . . But Congress, after discussion and consideration, decided to entrust this decision to the Board. It has had long experience in hearing and disposing of similar labor problems. With this experience and a knowledge of the standards generally used by arbitrators, unions, employers, joint boards and others in wrestling with this problem, we are confident that the Board need not disclaim the power given it for lack of standards. Experience and common sense will supply the grounds for the performance of this job which Congress has assigned the Board." *NLRB* v. *Radio and Television Broadcast Engineers Union, Local 1212,* 364 U.S. 573, 583 (1961).

In executing the responsibilities imposed upon it by Congress, the Board has isolated the hearing officer from the decision-making process.

The Court of Appeals for the District of Columbia in the *Bricklayers* case, 475 F.2d 1316 (D.C. Cir. 1973) felt that great weight should be accorded to the Board's long-standing, uniform interpretation of the Act, to the effect that the APA does not apply in § 10(k) matters:

> "Furthermore, we are faced with an unusually impressive administrative interpretation supporting the conclusion we reach, first adopted by the Board as long ago as 1949 in National Union of Maritime (*sic.*) Cooks and Stewards (Irwin Lyons Lumber Co.), *supra,* repeated in 1959 in

Local 8, Longshoremen (General Ore, Inc.), 124 N.L.R.B. 626, and until now, we believe, not questioned by courts or Congress. This interpretation of Section 10(k) by the Board is entitled to great weight. [Citation omitted.] It is noteworthy also that in neither NLRB v. Plasterers' Union, No. 79, *supra*, nor NLRB v. Radio & Television Broadcast Engineers Union No. 1212, 364 U. S. 573, 81 S.Ct. 330, 5 L.Ed.2d 302 (1961), was there a hearing officer's recommended decision in the Section 10(k) proceedings there involved, although, we must add, no question in that respect was raised."

B. In View of the Hearing Officer's Limited Authority, He Does Not Materially Influence the Decision.

The hearing officer's primary interest in the non-adversary § 10(k) proceeding is to ensure that the record contains all the pertinent facts. While he does make evidentiary rulings, the Board decides the case. Board Rules, 29 C.F.R. 101.34 (1973). The Board is interested in generally non-controvertible economic facts as illustrated by the Board's Decision and Determination of Dispute in this case. App. 9; 191 NLRB No. 122 (1971). The § 10(k) evidence concerned and the Board relied on such facts as the business of the Employer (App. 10), the labor organizations involved (App. 11), the background of the dispute (*Id.*), the certification and collective bargaining agreements (App. 16), area, employer and industry practice (*Id.*), the skills and training of employees (App. 18), the efficiency and economy of operations (App. 19) and other factors (App. 20).

Since such economic facts are, by and large, objectively verifiable, and since the hearing officer's rulings on evidence are subject to full review by the Board, the hearing officer's capability to influence the outcome of the proceeding, if he were so minded, is considerably less than the Court of Appeals conjectured.

In analogizing the § 10(k) proceeding to representation proceedings for the selection of a bargaining agent under § 9 of

the LMRA, the Court of Appeals in the *Bricklayers* case quoted from the Attorney General's Committee on Administrative Procedure in Government Agencies (Monograph No. 5, S. Doc. No. 10, 77th Cong. 1st Sess., Pt. 5, at 35 n. 141 (1941)) as follows:

> "The need for intermediate reports, to the extent that they provide a method for obtaining the judgment of the trial examiner on issues of fact dependent for their resolution upon the demeanor of witnesses, is rarely present in a representation proceeding. The evidentiary material relates to economic facts such as the nature of the employer's business, the duties of certain employees, and the history of collective bargaining in the plant. Issues of credibility are rarely present." (footnote omitted) 475 F.2d at 1319.

The D.C. Circuit then quoted with approval the following language from *National Union of Marine Cooks and Stewards (Irwin Lyons Lumber Co.)*, 83 NLRB 341 (1949):

> "The Board adopted such procedure because the decision in the proceedings under Section 10(k) is a preliminary administrative determination made for the purpose of attempting to resolve a dispute within the meaning of that section; the unfair labor practice itself is litigated at a subsequent hearing before a Trial Examiner in the event the dispute remains unresolved. It is to the subsequent adversary hearing, which leads to a final Board adjudication, that Section 8 [Section 557] of the Administrative Procedure Act applies." 475 F.2d at 1320.

In light of the hearing officer's very limited role, he cannot be said to participate in the agency decision and, therefore, § 554(d) of the APA does not apply.

III. The Opinion Below Would Thwart the National Labor Policy Seeking Prompt Resolution of Jurisdictional Strikes.

If, as the court below assumed, the § 10(k) hearing is to be treated as an adjudication, then significant, time-consuming consequences would result. The APA requires that the presiding officer must be an administrative law judge (5 U.S.C. § 556(b)(3)), that he file a recommended or initial decision (5 U.S.C. §§ 554(d) and 557(a)), and that the parties have an opportunity to submit proposed findings of fact and conclusions of law prior to the recommended decision and exceptions to that decision (5 U.S.C. § 557(c)). None of these requirements is followed in current Board practice.

Since the result of an adjudication is the whole or a part of a "final disposition," 5 U.S.C. § 551(6), (7), the aggrieved party would also have to be permitted to appeal from the § 10(k) decision, for the LMRA provides that "Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals . . . ." LMRA § 10(f), 29 U.S.C. § 160(f) (1970).

It is obvious that these additional procedures and appeal would result in vastly increasing the time involved in resolving jurisdictional disputes, contrary to the intent of Congress in enacting § 10(k). In the present case, 17 months elapsed between the final decision of the Board in the unfair labor practice case (June 22, 1972) and the order of the Court of Appeals denying the petitions for rehearing (November 26, 1973) App. 2. If there were added to this the time required for proposed findings of fact or exceptions, plus the additional appeal from the § 10(k) decision, the present procedure would be extended for additional months or years while jurisdictional disputes would drag on.

As the Court of Appeals observed in the *Bricklayers* case:

> "In the first place there is need obviously, for as expeditious a resolution of the jurisdictional dispute as is reasonably possible." 475 F.2d at 1321.

The legislative history of § 10(k) supports this obvious conclusion. In enacting § 10(k) Congress departed from the statutory scheme of relying solely on unfair labor practice procedures to control undesirable conduct. To be sure, Congress established a new unfair labor practice in § 8(b)(4)(D), 29 U.S.C. § 158(b)(4)(D) (1970), but it did not stop there. It added § 10(k) for the purpose of expediting resolution of jurisdictional disputes.

The Senate report noted that "Time is usually of the essence in these matters. . . ." S. Rep. No. 105, 80th Cong., 1st Sess., p. 8, Leg. Hist. 414. Thereafter, a provision in the Senate-approved bill to try jurisdictional disputes before an arbitrator was deleted. Instead, what are now LMRA §§ 10(j),(k) and (l) which include the availability of quick injunctive remedies were passed, 29 U.S.C. §§ 160(j), (k) and (l) (1970). Section 10(k) allows the parties only ten days to adjust or agree upon voluntary methods for adjustment, 29 U.S.C. § 160(k). Sections 10(j) and (l) allow injunctive relief by the Board "where such relief is appropriate" or "just." 29 U.S.C. §§ 160 (j) and (l). Thus Congress expected to provide "a rather quick and decisive remedy" for dealing with jurisdictional disputes. Senator Ellender in colloquy with Senator Morse, Leg. Hist. 1057-8.

The court below ignored the obvious consequences of its decision. To lengthen such proceedings by requiring an intermediate report, and by giving the aggrieved party two appeals to the Court of Appeals, one after the § 10(k) decision and one after the unfair labor practice decision, would defeat the Congressional goal of speed by unduly extending the time in which an employer would be subject to pressures from jurisdictional strikes.

IV. Local 134 Was Barred from Asserting in This Proceeding the Alleged Failure to Conform to the APA, Having Failed to Raise That Objection at Any Stage of the § 10(k) Hearing.

At no time during the § 10(k) proceedings did Local 134 contend that the APA was applicable. Yet, if § 554(d) were held to apply to the § 10(k) proceedings, then § 556 of the APA (5 U.S.C. § 556(a) (1970)) also would have to apply as the court below held, App. 70, and under that section the Board would have been required to appoint a Trial Examiner or Administrative Law Judge to conduct the hearing. Somewhat inconsistently the court below stated:

> "We assume that the § 10(k) hearing officer in this case is the equivalent of a hearing examiner for purposes of § 556, inasmuch as the statute so requires and no point was made of any distinction, either at the hearing or on appeal." App. 70, n. 3.

But this assumption of the court was incorrect. The record shows that the person who presided at the § 10(k) hearing was a regional office staff attorney designated as "hearing officer" and not a Trial Examiner or Administrative Law Judge as required by § 556 of the APA. Yet Local 134 never raised this objection at any time in the course of the § 10(k) proceedings. Local 134 should have urged the alleged APA violations before the Board at that time, and if the § 10(k) decision was final Local 134 should have at least attempted to appeal to the Court of Appeals.

The LMRA states:

> "No objection that has not been urged before the Board, its members, agent or agency, shall be considered by the Court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. § 160(e) (1970).

This Court has spoken unequivocally and clearly:

> ". . . [O]ur cases have uniformly held that in the absence of a showing within the statutory exception of 'extraordinary circumstances' the failure or neglect of the respondent to urge an objection in the Board's proceedings forecloses judicial consideration in enforcement proceedings." *NLRB* v. *Ochoa Fertilizer Corp.*, 368 U.S. 318, 322 (1961).

It is therefore clear that Local 134 is foreclosed from raising the issue of the applicability of § 556(d) of the APA, because of its failure to urge that matter before the Board; indeed, the statute itself states that such objection shall not "be considered by the court." 29 U. S. C. § 160(e) (1970).

V. Even if, Arguendo, § 554(d) of the APA Applies, There Was No Prejudicial Commingling of Judicial and Prosecutorial Functions and Consequently No Reason to Deny Enforcement of the Board Order.

A. At the Time of the § 10(k) Hearing the Hearing Officer Did Not Know He Would Later Be Appointed to Serve in a Prosecuting Role.

The Court of Appeals for the Seventh Circuit concluded that the Board violated § 554(d) of the APA because the hearing officer in the § 10(k) proceeding subsequently served in a prosecutorial capacity at the unfair labor practice hearing. App. 71. Section 554(d) provides that, "[A]n employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review. . . ." 5 U.S.C. § 554(d).

To overcome the doctrine of harmless error, the court then attempted to demonstrate that this alleged violation of the APA had resulted in harm or prejudice to Local 134. The court sought to find such harm by this reasoning:

> "We think that the *knowledge* on the part of the presiding officer that he will *subsequently* advocate a position based upon his own evidentiary rulings at the § 10(k) hearing could very well influence his decisions at that hearing." (emphasis added) (App. 71.)

The court incorrectly assumed that the hearing officer knew, at the time of the § 10(k) hearing, that he would later be assigned to prosecute an unfair labor practice case against Local 134, but there is absolutely no evidence in the record to support such a conclusion. Indeed, under the scheme of the Act and the Board's established procedures, the hearing officer could not possibly have known at the time of the § 10(k) hearing that he would subsequently be assigned to try such a case against Local 134. He could not have known for each of the following, compelling reasons:

1. The § 10(k) hearing was concluded in March, 1971. At that time, the hearing officer's connection with the case was concluded.

2. The Board itself had to determine whether Local 134 or CWA was entitled to perform the disputed work. At the time of the § 10(k) hearing, the hearing officer could not know whether Local 134 or CWA would be awarded jurisdiction of the work. The Board's decision was handed down on June 30, 1971, long after the hearing officer's connection with the case had terminated.

3. Thereafter Local 134 filed a motion for reconsideration in July, 1971. This was denied.

4. Even at this point, there was no unfair labor practice complaint issued against Local 134. Local 134 had the option of complying with the Board's decision or rejecting it. Not until Local 134 itself elected to reject the Board's decision did the General Counsel issue a complaint, initiating the unfair labor practice trial. The complaint was issued on September 10, 1971. (Only the General Counsel can issue a complaint under the Act, 29 U.S.C. § 153(d).)

5. Only at this point, after the issuance of a complaint, long after the hearing officer's connection with the § 10(k) hearing had terminated, could any of the parties or any of the Board's staff, including the hearing officer, know that there would be an unfair labor practice hearing against Local 134.

7. It was at this time, and not before, that an attorney was selected to prosecute the unfair labor practice complaint against Local 134. By chance, the attorney selected had presided at the § 10(k) hearing. The unfair labor practice hearing was held on November 4, 1971, before an Administrative Law Judge with no previous involvement in the case.

Thus, it is clear that at the time of the § 10(k) proceeding in March, 1971, the hearing officer did not have and could not have had "knowledge" that he would in November "advocate a position based upon his own evidentiary rulings."[2] A noted authority on administrative law has declared:

> "The occasional practice of assigning a single officer to preside at the hearing and to develop the facts becomes harmful only if the officer tries to build a case on one side and then later has to pass upon the extent of his own success." K.C. Davis, 2 *Administrative Law Treatise* § 13.07 (1958).

Significantly, even Local 134 never claimed in its brief or argument in the Court of Appeals that the hearing officer knew at the time of the § 10(k) hearing that he would later be assigned to the unfair labor practice case. Yet, with no foundation in fact, the opinion below attributes such knowledge to the hearing officer and predicates the denial of enforcement on this extraordinary error.

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2. The Court of Appeals relied upon *Wong Yang Sung* v. *McGrath*, 339 U.S. 33 (1950). App. 69-70. That case turns on the judicial bias of a hearing officer who has at once the responsibility of appraising a case and also of seeking to make it as strong as possible. That case is inapplicable to our facts since the § 10(k) hearing officer had no psychological stake in the outcome of the case.

B. Since the Judicial Function Was Fully Neutral and Untainted, There Was No Prejudice to Any Party, and No Justification for Denial of Enforcement of the Board's Order.

It should be noted that Local 134 never claimed, and the Court of Appeals never found any *actual* impropriety in the conduct of the § 10(k) hearing officer. The hypothetical impropriety found by the court is based entirely upon a misunderstanding of the facts. Local 134 was not in fact denied a fair hearing. It was not prejudiced. If Local 134 was not prejudiced, why should the unfair labor practice trial before the Administrative Law Judge, and the decision of the Board all be overturned? Enforcement of a Board order should not be denied for minor mistakes or trivial irregularities. See *NLRB* v. *Mattison Machine Works*, 365 U.S. 123 (1961), where this Court said: "In the absence of proof by the employer that there has been prejudice to the fairness of the election such trivial irregularities of administrative procedure do not afford a basis for denying enforcement to an otherwise valid Board order."

Section 10(a) of the LMRA empowers the Board to "prevent any person from engaging in any unfair labor practice . . . affecting commerce." 29 U.S.C. § 160(a) (1970). The Board found that an unfair labor practice was committed by Local 134. The Court of Appeals agreed that Local 134 had violated the LMRA. App. 67-68. Since the only stated reason for the court's refusal to enforce the Board's order was a misunderstanding of the facts, and since the alleged commingling of functions, even if it occurred, violated the APA only in a technical and harmless manner without prejudice to any party, the Board's order should be enforced.

CONCLUSION.

We respectfully request that the decision of the Court of Appeals be reversed insofar as it denied enforcement to the Board's order; and that the Board's order be affirmed and enforced.

Respectfully submitted,

CHARLES V. KOONS,
JEROME SCHUR,
IRVING M. FRIEDMAN,
HAROLD A. KATZ,
Attorneys for CWA.

KANE & KOONS,
1100 Seventeenth St., N. W.,
Washington, D. C. 20036,

KATZ & FRIEDMAN,
7 South Dearborn,
Chicago, Illinois 60603.

APPENDIX 1.

LABOR MANAGEMENT RELATIONS ACT, 29 U.S.C. § 151, et seq. (1970).

29 U.S.C. § 153

(d) There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 160 of this title, and in respect of the prosecution of such complaints before the Board and shall have such other duties as the Board may prescribe or as may be provided by law. In case of a vacancy in the office of General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy, but no person or persons so designated shall so act (1) for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted.

29 U.S.C. § 158(b)(4)(ii)

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: *Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

29 U.S.C. § 160

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State of Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

29 U.S.C. § 160

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it

the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

29 U.S.C. § 160

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith thereupon transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

29 U.S.C. § 160

(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor

practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

29 U.S.C. § 160

(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

29 U.S.C. § 160

(*l*) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 158(b) of this title, or section 158(e) of this title or section 158(b) (7) of this title, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injuntive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such

injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *Provided further*, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period: *Provided further*, That such officer or regional attorney shall not apply for any restraining order under section 158(b) (7) of this title if a charge against the employer under section 158(a) (2) of this title has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further*, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organizations and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 158(b) (4) (D) of this title.

APPENDIX 2.

ADMINISTRATIVE PROCEDURE ACT,

5 U.S.C. § 551, et seq. (1970).

5 U.S.C. § 551

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

5 U.S.C. § 554

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply—

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

5 U.S.C. § 556

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence—

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more hearing examiners appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

APPENDIX 3.

RULES AND REGULATIONS OF THE NATIONAL LABOR RELATIONS BOARD, SERIES 8, AS AMENDED.

29 C.F.R. § 101.34

SEC. 101.34 HEARING.

If the parties have not adjusted the dispute or agreed upon methods of voluntary adjustment, a hearing, usually open to the public, is held before a hearing officer. The hearing is non-adversary in character, and the primary interest of the hearing officer is to insure that the record contains as full a statement of the pertinent facts as may be necessary for a determination of the issues by the Board. All parties are afforded full opportunity to present their respective positions and to produce evidence in support of their contentions. The parties are permitted to argue orally on the record before the hearing officer. At the close of the hearing, the case is transmitted to the Board for decision. The hearing officer prepares an analysis of the issues and the evidence, but makes no recommendations in regard to resolution of the dispute.

JUL 11 1974
MICHAEL RODAK, JR., CLERK

SUPPLEMENTAL APPENDIX OF THE NATIONAL LABOR RELATIONS BOARD

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1313

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION, COMMUNICATION EQUIPMENT AND SYSTEMS DIVISION,

Petitioner,

—v.—

LOCAL 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 25, 1974
CERTIORARI GRANTED MAY 13, 1974

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1312

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION, COMMUNICATION EQUIPMENT AND SYSTEMS DIVISION,

Petitioner,

—v.—

LOCAL 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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* The Board is filing a separate appendix because, although a party, it was not afforded an opportunity to designate material for inclusion in petitioner's appendix.

EXCERPTS FROM THE HEARING BEFORE THE NATIONAL LABOR RELATIONS BOARD, THIRTEENTH REGION, IN CASE NO. 13-CD-209:

[Caption Omitted]

[3] PROCEEDINGS

HEARING OFFICER: SCHULSON: The hearing will be in order.

This is a formal hearing in the matter of Local Union No. 134, International Brotherhood of Electrical Workers, AFL-CIO and International Telephone and Telegraph Corporation, Communications Equipment and Systems Division and Communications Workers of America, AFL-CIO, Case No. 13-CD-209.

The Hearing Officer for the National Labor Relations Board is Stephen S. Schulson.

Will Counsel now state their appearances for the record.

For the Employer?

MR. O'BRIEN: Seyfarth, Shaw, Fairweather and Geraldson by John D. O'Brien and Peter J. Hurtgen, 111 West Jackson Boulevard, Chicago, Illinois.

HEARING OFFICER: For the IBEW?

MR. FITZGERALD: For Local 134, IBEW, Robert E. Fitzgerald, 53 West Jackson, Chicago, Illinois, 60604.

HEARING OFFICER: For the Communication Workers of America?

MR. SCHUR: The law firm of Katz and Friedman by Jerome Schur, 7 South Dearborn Street, Chicago, Illinois, 60603.

* * * *

[5] HEARING OFFICER: I wish to inform all parties that the official Reporter makes the only official transcript of these proceedings and all citations and briefs and arguments must refer to the official record.

After the close of the hearing if the parties wish to make corrections in the record, all such proposed corrections by way of stipulation or motion should be for-

warded to the Board instead of to the Hearing Officer as the Hearing Officer—in as much as the Hearing Officer has no power to make any rulings in connection with this case after the hearing is closed.

I wish to state that all matter is recorded by the official Reporter while the hearing is in session and if the parties wish to make off the record remarks, they should be made to the Hearing Officer and not the Reporter.

Reasons in support of motions should be concise and specific and made on appropriate request and should be made on the entire line of questioning. Exceptions should be allowed to adverse rulings.

Copies of pleadings submitted during the course of the hearing are to be filed with the Hearing Officer.

[6] This is a nonadversary proceeding. The purpose of the Hearing Officer is to be sure the record contains as full and concise a statement of the pertinent facts as is necessary for the determination of the issues by the Board.

Off the record.

(Discussion held off the record.)

HEARING OFFICER: On the record.

In an off the record discussion, the parties have agreed to the following stipulation:

International Telephone and Telegraph Corporation, Communications Equipment and Systems Division, is engaged in the distribution and installation of electronic telephone equipment and related products with facilities in Connecticut, Illinois, Tennessee, New York, New Jersey, California, Florida, and other states.

The Illinois facility mentioned above is a sales office.

During the past calendar year International Telephone and Telegraph Corporation, Communications Equipment and Systems Division, in the normal course and conduct of its business operations has received goods and materials valued in excess of $100,000 which were shipped to its facilities directly from across state lines.

These goods and materials were manufactured by other divisions of International Telephone and Telegraph Cor-

poration, Communications Equipment and Systems Division.

[7] International Telephone and Telegraph Corporation, Communications Equipment and Systems Division, is now and at all times material herein been an employer engaged in commerce within 2(6), (7) and (8) (b) of the National Labor Relations Act.

MR. O'BRIEN: The Employer stipulates.

MR. FITZGERALD: We will stipulate.

MR. SCHUR: The Communication Workers so stipulate.

HEARING OFFICER: The stipulation is received.

Off the record.

(Discussion held off the record.)

HEARING OFFICER: On the record.

I propose the following stipulation:

Local Union No. 134, International Brotherhood of Electrical Workers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the National Labor Relations Act.

Will the parties stipulate to this?

MR. O'BRIEN: The Employer so stipulates.

MR. FITZGERALD: So stipulate.

MR. SCHUR: So stipulated.

HEARING OFFICER: Stipulation is received.

I propose the following stipulation:

The Communications Workers of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the National Labor Relations Act.

• • • •

[DIRECT EXAMINATION OF MARGARETA SCHWELLENBACH]

[17] HEARING OFFICER: Go ahead.

Q (By Mr. O'Brien) Miss Schwellenbach, or Mrs. Schwellenbach, do you know whether ITT was licensed under the ordinance reflected in IBEW Exhibit No. 2 for

the performance of the installations of telephone equipment at the Elk Grove Village Administration Hall?

A Yes, they were.

MR. FITZGERALD: I am sorry, could I have the answer read back?

HEARING OFFICER: Yes, they were is the answer.

MR. FITZGERALD: The answer is yes?

THE WITNESS: Wait a minute.

MR. FITZGERALD: I think we have a problem. We don't have response to the subpoena.

MR. O'BRIEN: Let her finish the answer.

THE WITNESS: No.

MR. O'BRIEN: They were not licensed.

That shows how the village interprets the ordinance. We were not licensed, therefore it is apparent the villige did not deem the contract as with the village itself.

MR. FITZGERALD: I am going to object from the testimony from the Company Counsel. He's not telling us what the village people . . .

HEARING OFFICER: He's arguing on the admission of this document.

[18] Let me ask you a question, Mrs. Schwellenbach.

THE WITNESS: Schwellenbach.

HEARING OFFICER: Where did you obtain this document?

THE WITNESS: That comes . . .

MR. FITZGERALD: I supplied it for her, Mr. Hearing Officer. It's a copy of the village ordinance that is available for one dollar at the village hall.

HEARING OFFICER: How do you know it's a copy of the village ordinance?

THE WITNESS: I have seen a copy of the names and everything are correct. It's not certified.

HEARING OFFICER: I will receive this.

MR. SCHUR: Mr. Hearing Officer, this is a document handed to her by Counsel. There is no indication she read anything other than the cover.

I think we ought to ask her that much.

HEARING OFFICER: She testified she knows this is the village ordinance.

MR. O'BRIEN: She also testified in fact that the village with whom ITT had a contract did not deem ITT to be covered by that.

MR. FITZGERALD: Objection, not her testimony.

MR. O'BRIEN: She said no, they were not licensed under that ordinance.

HEARING OFFICER: I am not sure at this time how much [19] relevance this has.

This is a non-adversary proceeding.

I will receive IBEW Exhibit No. 2.

(The document heretofore marked IBEW Exhibit No. 2, for identification, was received in evidence.)

* * * *

[57]

[DIRECT EXAMINATION OF J. D. FOSTER]

[BY MR. HURTGEN]

Q Have communications technicians of CESD installed equipment the same as or similar to the equipment that was installed at Elk Grove Village at other locations?

A Yes, they have.

Q Could I have this identified or marked for identification, please, as Employer's Exhibit 1?

(Whereupon, Employer's Exhibit No. 1 was marked for identification.)

HEARING OFFICER: You said the CESD employees installed the same equipment at other locations as they installed at Elk Grove Village.

Why don't you read back that question?

(Record read.)

HEARING OFFICER: Now, you meant by that the equipment [58] that they installed at Elk Grove Village. . .

THE WITNESS: The equipment installed at Elk Grove Village is the same or similar to the equipment that has been installed at other locations.

The employees are the same employees or same type of employees that installed at other locations.

HEARING OFFICER: All right.

* * * *

[BY MR. HURTGEN]

[64] Q Do you know a man by the name of VanWattering?

A I do.

Q Is he in the room presently?

MR. FITZGERALD: I object to any further testimony in this area because we will not—we will stipulate that Local 134 claims this work that is in question.

I don't think any further—I think any pursuit in light of that is unnecessary in light of the stipulation.

MR. HURTGEN: I am happy for the stipulation, Mr. Hearing Officer. I think the testimony will go beyond that point to items and elements which are necessary for 8(b)(4)(d), that is the threat made beyond the claim.

HEARING OFFICER: You stipulate to engaging in conduct in 8(b)(4)(i)(ii)(D)?

[65] MR. FITZGERALD: No, because I don't think that necessary for the 8(10)(k) hearing to be held.

Now, the violation of the statutes, the Regional Director therefore the Board apparently felt there is reasonable cause to believe that this violation took place because it proceeded into Federal District Court.

I see no. . .

HEARING OFFICER: The Board hasn't ruled there is reasonable cause. I will allow the testimony.

MR. FITZGERALD: My point is you don't need the Board to rule there is reasonable cause to believe it and that has been cited by the Regional Director before, you have the authority for a 10(k) hearing.

I think that is what the Court of Appeals pointed out the Board misinterpreted its function in the 10(k) hearing. It's not intended for the purpose of litigating 8(a)(4)(b) if there's in fact a jurisdictional dispute and we admit there is.

HEARING OFFICER: Under Board Law I know it's proper to have testimony on 8(b) (4) (i) (ii) (d).

MR. FITZGERALD: I object.

HEARING OFFICER: I will read that Court of Appeals decision during the break.

* * * *

[BY MR. HURTGEN]

[80] Q Which job are you referring to?

A Howard Johnsons.

MR. FITZGERALD: Mr. Hearing Officer. . .

THE WITNESS: Motel.

MR. FITZGERALD: Let me point out the reason I have to object again is we are litigating here apparently an alleged 8(b) (4) (d) violation that took place in New York.

MR. HURTGEN: We are not, your Honor.

MR. FITZGERALD: I may just finish—I have been precluded previously from going into events concerning the execution of what we contend is an invalid contract.

Now we are going into another alleged violation of the statute again outside the 10(b) period which has no relevancy to this hearing.

HEARING OFFICER: As I said before I am allowing this testimony in as background for some sort of agreement that was eventually entered into which I consider relevant in this proceeding.

Continue your questioning.

* * * *

[BY MR. HURTGEN]

[86] Q Now, were there any other incidents of a dispute between CESD and any local of the International Brotherhood of Electrical Workers who would perform the work of installing and maintaining the equipment?

MR. FITZGERALD: Mr. Hearing Officer. . .

MR. HURTGEN: That were concerned in this hearing.

MR. FITZGERALD: Mr. Hearing Officer, I am now going to object.

We have apparently left the Local 3 incident. I move all the testimony be stricken because it started out it was an unfair labor practice charge and supposedly a settlement agreement which this witness was not a party to, strictly hearsay on the terms of the settlement.

We have a supposed later affirmation of agreement and again no testimony relating to the unfair labor practice [87] concerning possibly at best a recognition by this Employer that Local 3 is entitled to the cable pulling in New York City.

I submit it should be stricken and is of no value to substantiate the alleged unfair labor practice charges were withdrawn pursuant to the agreement of June 10th —the witness was not there.

HEARING OFFICER: I agree the testimony to the agreement is completely hearsay, but in these proceedings it—and it may very well be worthless, but these proceedings, the technical rules of evidence do not apply. The testimony is already in so I will not strike it.

* * * *

[106] MR. FITZGERALD: Well, Mr. Hearing Officer, I think we have now the exact problem or question which I pose to you that is that company asking and the CWA as I listen to their statement is in effect asking that this hearing be conducted on a nationwide basis for the resolution of the dispute and I am saying to you that if that is the case, then the Board must necessarily allow the IBEW to be represented.

I agree that we are not talking about Elk Grove Village when we are talking about the jurisdictional award to settle this case. It will in effect be Local 134 jurisdiction that Cook County, that is what I am talking about, but the Company is asking for an award or Order as they put it which would be nationwide in scope because as they contend they have had trouble coast to coast.

Well, obviously if you consider New York and Los Angeles coast to coast I have to—they have had it.

I think it's improper for us, that is Local 134, to put in—to be put in the position of having to defend and to go into proof presumably of what took place, what is the work practice in New York or in Los Angeles when that

is not what this jurisdictional dispute was noticed up to concern itself with.

Now, if we are going to go nationwide, then I make—I am back to my original position. I think there has to be some determination by you as Hearing Officer on the scope of the [107] hearing and by the Board ultimately on the scope of its Order.

If you don't make a decision in that regard, we are going to end up with the Company arguing nationwide, 134 for its jurisdiction and I assume CWA nationwide.

Then we may get if from the Board an Order or decision on jurisdiction which will be nationwide in scope without the proper parties, namely the IBEW through its own counsel being present.

I think that would be a severe lack of due process. I think we are further questioning this whole nature of the hearing we are having here today.

HEARING OFFICER: Well, the scope of the determination by the Board is something that will have to be argued in brief.

During this proceeding I am going to allow all evidence that is relevant, has been considered relevant in Board decisions in which the Board makes a determinatino of to whom the disputed work should be assigned and if you feel that any evidence that is being presented as I said before is irrelevant, then I will rule on your objection at that time.

If you are proposing that we adjourn the hearing and joint the International or other locals of the IBEW as parties at this time, I will deny the motion.

• • • •

[DIRECT EXAMINATION OF LESTER FULTON]

[BY MR. O'BRIEN]

[180] Q Now, this triline telephone could a central office equipmentman from Bell install that telephone?

A If he had the related PBX equipment experience he could take the prints and figure it out.

HEARING OFFICER: Let me ask a question.

You use the term "PBX" and "PABX" interchangeably?

THE WITNESS: Yes.

The difference is one is a private branch exchange might be a manual automatic system and it covers all private exchanges.

The "A" stands for automatic which indicates automatic features of the equipment.

HEARING OFFICER: Which one is involved in the Elk Grove project?

THE WITNESS: This is a EPABX.

Electronic Private Automatic Branch Exchange.

• • • •

[BY MR. O'BRIEN]

[198] Q They were electricians?

A Yes, sir.

Q Did your communications technicians complete the job?

MR. FITZGERALD: Excuse me, Mr. Hearing Officer. If that is all we are going to get on the conversation with the foreman Jack, I move it be stricken because there is no way the connection made between the fellow Jack who is identified as a foreman and Local 134 and anything that this witness testified as to Jacks relating about employees is strictly hearsay.

MR. O'BRIEN: It goes to the point of reasonable cause to believe that there's been a violation by this labor organization of Mr. Fitzgerald's of a violation of 8(b)(4)(D) and it's relevant in that regard.

MR. FITZGERALD: Well, if it . . .

MR. O'BRIEN: It corroborates—may I finish?

MR. FITZGERALD: Sure.

MR. O'BRIEN: It corroborates what Mr. Fulton said with respect to his observations of people walking off the job.

HEARING OFFICER: Mr. Fitzgerald?

MR. FITZGERALD: You finished?

MR. O'BRIEN: I am finished.

[199] MR. FITZGERALD: If the Board as Mr. O'Brien has indicated is going to make some finding on an unfair labor practice based on the testimony here, it should be proper testimony and I am submitting that this hearsay type testimony is not proper for the Board to use.

Now, you may, as the Hearing Officer pointed out, in the 10(K) aspect for jurisdictional purposes, we don't follow strict rules of evidence, but in the unfair labor aspect, I submit we should not allow in hearsay testimony for the unfair labor practice aspect.

MR. O'BRIEN: Well, the Board . . .

HEARING OFFICER: I don't need any more discussion on this.

It's hearsay—I agree with that.

I will let it in for what it's worth.

• • • •

[CROSS EXAMINATION OF LESTER FULTON]

[BY MR. FITZGERALD]

[210] Q Now, do you have—you personally or ITT have these blue prints and specifications?

A They are available, yes, I have them in Elk Grove Village.

Q To your knowledge they are now out at Elk Grove Village?

A They are now at Elk Grove Village.

Q Are they under your custody or ITT's custody out there?

A Yes, sir.

Q How soon would you be able to bring those in if they are [211] subpoenaed?

MR. O'BRIEN: I object.

These documents were never subpoenaed and I don't think it's a fair question for the witness as to how soon he can bring them in.

The determination of whether they will be brought in will be made by someone other than the witness.

MR. FITZGERALD: Mr. Hearing Officer, I'd—I am asking for a subpoena from you in order to subpoena the document.

MR. O'BRIEN: I'd like the record to reflect we have, with the exception of the items specified, complied with the other items of the subpoena and these documents were not subpoenaed and we think it's a rather late date for the IBEW at this time to be engaged in a fishing expedition with documents.

This hearing has been pending for many weeks and now suddenly they are asking for documents. Had we known they had wanted the documents, perhaps we'd had them here in the hearing room ready to go.

HEARING OFFICER: You are asking for a subpoena form?

MR. FITZGERALD: Yes.

If I may address myself to the point?

I think we had assumed the Company would have presented the documentary evidence. Apparently they chose not to for whatever reasons. I think it is essential to the Board to [212] get the documents or copies of them.

HEARING OFFICER: I will supply you with a subpoena form and you can serve it if you wish.

MR. FITZGERALD: Why don't I continue the questioning. Then when we are finished, subpoena them.

HEARING OFFICER: All right.

* * * *

[228] MR. FITZGERALD: Well, if I comment on the last.

HEARING OFFICER: There is no need to comment. Are you going to answer the question or are you . . .

THE WITNESS: I do not wish to divulge the man's name.

MR. FITZGERALD: Well, I move that all this testimony that was elicited on so-called recruiting be stricken because again we have not only a very speculative type of testimony, but we have a direct refusal to testify.

HEARING OFFICER: I will not strike the testimony, but the record will show that the witness refused

to give you the name and therefore you are certainly disadvantaged in trying to check the accuracy of what he said, but we will let the testimony stand for what it's worth.

MR. FITZGERALD: Well, I think, Mr. Hearing Officer, that that is exactly—you hit it by saying for what it's worth.

It's not worth anything if we are unable to verify the accuracy of this testimony and we cannot cause for all we know if they have talked to someone, this individual may have [229] already said I don't want to work for you and so we have no way of verifying this and it's just not worth anything.

HEARING OFFICER: You can make your argument in brief on what this is worth.

I am not striking this testimony.

MR. FITZGERALD: All right.

* * * *

[230] RECROSS EXAMINATION

Q (By Mr. Schur) As I understand it, Mr. Fulton, what you are trying to do is hire one man that would form a nucleus of a possibly expanding if economy needs so require?

A Yes, sir, his requirement must be I'd promote him into a management job at the earliest possible date in order that he can recruit his own crew.

Q Thank you.

No further questions.

HEARING OFFICER: Mr. Fulton, in the description in the Formal Papers of the work in dispute there is mention of accepting telephone servicing, the police and fire departments.

Now, who installed or who installed these telephones when were they installed?

THE WITNESS: The police and fire emergency telephones?

HEARING OFFICER: I believe that is what this refers to.

THE WITNESS: They were completed—I couldn't give you [231] an exact date, but around the 18th of December. That was when they moved from the old police and fire department down to the new police.

The fire department moved down there on the 15th—around the 15th of December which indicated their—most of their telephone stuff was in, but they also had radio which they used a lot until they—they talked about using the radio very much in place of telephone till they were completed.

HEARING OFFICER: Who installed this equipment?

THE WITNESS: The telephone equipment was installed by Illinois Bell.

HEARING OFFICER: Any questions on this?

* * * *

[CROSS EXAMINATION OF C. D. FOSTER]

[238] Q (By Mr. Fitzgerald) Did in fact ITT employ Illinois citizens on the Elk Grove job?

MR. O'BRIEN: Objection. Irrelevant, immaterial, calling for a legal conclusion what an Illinois citizen is. Are they domiciled here.

HEARING OFFICER: Overruled.

MR. O'BRIEN: Those are legal conclusions.

HEARING OFFICER: Overruled.

MR. SCHUR: We are getting into an constitutional issue of whether the Illinois constitution is constitutional in denying the right of non-citizens to work in Illinois.

MR. O'BRIEN: Also presumes . . .

HEARING OFFICER: You can argue all these things in your [239] brief if you want to.

Do you understand the question?

* * * *

[330] Mr. O'Brien, you have a motion?

MR. O'BRIEN: Yes, with respect to the subpoena duces tecum calling for the production of documents which was served in this hearing today shortly before 2:00 p.m., and it's now 3:35, 3:34.

It's my understanding that the three subpoenaes which were served on Company representatives all call for the production of the same documents?

MR. FITZGERALD: Yes.

MR. O'BRIEN: So therefore, my remarks apply to all three.

Number One, it calls for the production of Company records including, but not limited to timecards showing the total number of hours worked by employees at ITT at the Village of Elk Grove installation.

We say that that's irrelevant and immaterial at this late date; that we have testimony in the record showing the number of hours it took employees to perform the installation; no objection was made by Mr. Fitzgerald, no timely objection when that testimony was introduced, and therefore, he has waived any objection to now claiming that the documents constitute the best evidence.

These documents also are in New York and it would be burdensome on the Employer to have to produce these documents in view of the fact that the IBEW has been on [331] notice for over two months that this hearing—of this hearing. If they wanted those documents, they could have asked for them at a more timely point in the proceedings; namely, before the hearing began.

That also applies, what I have said about Paragraph 1, to Paragraph 2.

As to Paragraph 3, which calls for the production of Company records, including shipping orders of common carriers showing all supplies and materials and equipment delivered and the date of delivery at Elk Grove Village of telephone equipment installed by the Company, that is totally and completely irrelevant and immaterial unless the IBEW is contending that there was no ITT equipment installed there at all. It seems to me that there is no issue with respect as to whether or not this kind of equipment was delivered there, unless they are seriously contending that ITT did not in fact install telephone equipment at Elk Grove Village. I say that that is totally irrelevant and Immaterial, and I think supports our claim that these subpoenaes served were

for no purpose other than to interpose delay in these proceedings.

As to Item No. 4, the technical specifications, again, irrelevant and immaterial at this point, not timely asked for, the best evidence rule is not applicable and would be nothing more than cumulative evidence.

[332] Those documents, also, I'm not sure whether at this point precisely where they are located.

And that concludes our position with respect to the subpoenaes.

* * * *

[336] MR. SCHUR: Mr. Hearing Officer, while we are not directly—we are not a direct party to this dispute, I do wish to express the position of the CWA which is that we will oppose anything which seeks to further delay this hearing.

There have been any number of delays and if obtaining records from New York is going to further delay things, then I think the position of the CWA should appear in this record.

MR. FITZGERALD: In that very point, I have heard another thing indicated that these documents could not be here, or a summary, compiled from there on Wednesday when we are scheduled to reconvene—

MR. O'BRIEN: Well, how are those documents going to be transported? Are they offering to pay to send someone to New York on an airplane and return?

And another thing, they haven't tendered witness fees to Mr. Geneen, who is in New York, for example.

MR. FITZGERALD: All right. I submit this:

We would rely on the United States—possibly it's no longer United States—but the Postal Service, and I think this is not a very difficult talk. There is one job. You asked—he asked for cost. I think it's [337] reasonable to assume that the Company's internal accounting should have a cost figure on the labor on this job already compiled, but in any event, it is not a big job. There are already documents readily available here in Elk Grove. And as to this Counsel being unprepared for the efficiency argument, I was not unprepared for it, but I think it is not improper for me to assume that

the Company would put in the best evidence; namely, records.

HEARING OFFICER: Well, if this was an adversary proceeding, I might grant the petition on the grounds of the fact that the material was subpoenaed so late in the day, but since I, as Hearing Officer, have the responsibility to see that there is a complete and full record, I will deny the petition, except that as goes to Number 3. I can't see the relevancy of Number 3. But as to 1, 2 and 4, I see the relevancy as to those items and I would, deny the petition as to Number 4—and I will deny the petition as to Number 1, 2 and 4.

* * * *

[RECROSS EXAMINATION OF
TIMOTHY J. BRESNAHAN]

[BY MR. O'BRIEN]

[457] Q There was no installation of switchboards being performed by contractors in the Association with whom Local 134 has a contract prior to that time?

A I would say in general there had been work—this would be going on—we have had contractors doing all this type of work. These men would be assigned out for general assignment.

Q No further questions.

MR. FITZGERALD: Nothing further.

HEARING OFFICER: Mr. Bresnahan, let me get something straight.

Have you received requests for employees with PBX experience?

THE WITNESS: Yes, sir, recently here definitely.

HEARING OFFICER: Now, since 1968 how many requests did you receive for employees with PBX experience?

THE WITNESS: To the best of my knowledge I can only, I can go back to two definite instances which occurred in the last few months, one with C. A. Riley and one with Henry Nangart Company.

HEARING OFFICER: When you received these requests, what did you do in attempting to fill the request?
[458] THE WITNESS: We checked with availability of the men we have registered for work. If we can't secure one from one of these available, then we seek—we have a provision in our agreement for loaning a specialized worker.

If they have a man with the necessary skills who are currently employed by another employer, we will contact the employer. If he's not using the particular skill with that employer, we will arrange a loan to the other employer.

HEARING OFFICER: When you receive the request, do you look at the files?

THE WITNESS: Yes, sir.

HEARING OFFICER: What are you looking for?

THE WITNESS: Generally looking for a man with electronics program graduate of the apprentice program or graduate of the trade school, in this case PBX skill, we look for PBX background.

HEARING OFFICER: Do you have a separate listing of PBX?

THE WITNESS: No, sir.

HEARING OFFICER: You don't look through all 6,000 files?

THE WITNESS: No.

HEARING OFFICER: Where would you go after you receive the request?

THE WITNESS: Mainly on personal knowledge, mainly the applications filed initially—if I may go back, I said no, we [459] have the application of the PBX men in one separate file since '68.

We kept a particular group—we kept a listing on them at that particular time in 1968. We made a list on those working and available.

HEARING OFFICER: By looking at the files, how do you know they are available?

THE WITNESS: Based on the application form we know most of them went back to work after the strike. We know we ended up with approximately 50—40 to 50

that never returned to Bell and they are either working or available for work at the present time.

HEARING OFFICER: How do you determine that?

THE WITNESS: By virtue of the fact they kept in contact or they are severed recently within the last couple months due to economics.

HEARING OFFICER: What—if you look at the files and find none available?

THE WITNESS: Then we go to those working and see if we can find—I'd call a superintendent of the various firms and ask if they have any men they know specifically who have done PBX work or in general if we are looking for a cable splicer and we know which firms employ them and contact the superintendent of the firm and ask them directly if they have this type of man in their employ.

[460] HEARING OFFICER: All right, anything raised by my questions?

* * * *

[463] Q Do you still require people to designate whether they are Negro, Spanish American, Oriental, American Indian or Caucasian?

MR. FITZGERALD: Objection, objection.

THE WITNESS: Not to employe . . .

HEARING OFFICER: Just a minute.

Just a minute.

I will sustain the objection.

MR. O'BRIEN: No further questions.

HEARING OFFICER: You said you had two requests, requests from two companies with employees for PBX Experience?

THE WITNESS: Yes, sir.

HEARING OFFICER: Did you assign any employees to these requests?

THE WITNESS: No, Riley called me at the time to see if I had, if we had somebody available at that particular time. We didn't assign anybody.

HEARING OFFICER: What about the other?

THE WITNESS: To the best of my knowledge Henry Newgart put on Mr. Shannon, employed him for this purpose.

HEARING OFFICER: Did you refer Shannon?

THE WITNESS: Shannon was through my office, yes, sir, to Mr. Henry Negart.

HEARING OFFICER: All right, anything raised by my [464] questions?

* * * *

[RECROSS EXAMINATION OF EDWIN F. JANIK]

[BY MR. SCHUR]

[506] Q You talking about 1971?

A No, I am talking about 1970.

I can't be talking about '71 as yet, Mr. Schur.

Q You are telling us over the calendar year 1970—strike that.

Over the calendar year 1970 approximately what percentage of your total income was derived from the interfaces?

A '70, about 15 percent.

Q And '69?

A '69, none.

Q All right, that is all.

HEARING OFFICER: Let me ask you a couple questions.

How many employees do you have now?

THE WITNESS: We have—with the union—you mean under the IBEW contract?

HEARING OFFICER: Yes.

THE WITNESS: 11 or 12.

HEARING OFFICER: Where do these employees come from—how did you obtain these employees?

THE WITNESS: Oh, local telephone company, people like ITT where they worked for the installation departments of these manufacturers of this type of equipment, telephone [507] equipment background, background in electronics where we get involved in very sophisticated electronic equipment, people that may have had schooling or education in these areas.

We are very much interested in these type people.

HEARING OFFICER: After these employees came to work for you were they given any training you are aware of?

THE WITNESS: Yes, they were given training for example in the telephone field as well as in the electronic application of our specialized communications-services.

HEARING OFFICER: And where do they receive this training?

THE WITNESS: They could receive the training either at the employers premises or at our offices.

We have a continuous training program on our premises where periodically we get the service people together to apprise them of new products, new concepts, of the products, the service field, service requirements of the product, this type of thing.

HEARING OFFICER: Now, just so the Record is clear, will you just list all the different kind of products that these employees install?

THE WITNESS: Just telephone products and associated sound systems.

HEARING OFFICER: Can you be more specific—what kind of products?

THE WITNESS: What kind of telephone products?

HEARING OFFICER: Yes.

[508] THE WITNESS: For the greater part they are ITT products.

Then, of course, the second product of more recent years, since 1968-69, we have and they still continue to install ITT products because what happened here as we upgrade an ITT system say, then this particular product that we originally sold as ITT, then become saleable again for the market in the form of a reconditioned system, but it's a basic ITT product so today the entire emphasis of installation, service still has been with ITT products.

In addition to that they also put in the Nureico system as I mentioned earlier. We also put in another intercom system as manufactured by the Delta Communication Corporation, Automatic Electric and that is about the extent of the telephone line of connections.

HEARING OFFICER: Now, the Nurelco system, is that a PBX system?

THE WITNESS: It's a PABX system, yes, sir.

HEARING OFFICER: Are you familiar with the ITT PABX system?

THE WITNESS: Yes, sir, we are.

HEARING OFFICER: What is the basis for your familiarity?

THE WITNESS: Let me qualify that.

We are familiar with the 400 series which is the EPABX.

We have attended sessions at the Oak Brook office in anticipation of becoming a part of the national organization [509] as far back as latter part of '68, latter part of '69, early part of '70 and the gentleman at that time who was interested in promoting this particular service was a gentleman by the name of Mr. Tom Hughs.

HEARING OFFICER: Now, based on this experience, will you tell us the similarities and differences between installing the EPABX systems, the 400 series, and installing the Nurelco PBX system that you testified to.

THE WITNESS: The similarities in installing the 400 series versus the Nurelco system are the same.

The similiarities in installing the two systems.

HEARING OFFICER: And then you are saying there are no differences as far as the installation?

THE WITNESS: In the installation of the two products, no.

HEARING OFFICER: Are there any differences as far as maintenance?

THE WITNESS: Yes.

HEARING OFFICER: Briefly tell us what those are.

MR. O'BRIEN: This gentleman already indicated he's not an expert.

I object to this conclusionary testimony.

HEARING OFFICER: Overruled.

Tell us what the differences are as far as the maintenance go.

[510] THE WITNESS: Basically one is a step by step unit. The other is a solid state piece of equipment.

The background of this individual has to be different.

HEARING OFFICER: Which one is solid state?

THE WITNESS: The 400 series, the ITT.

HEARING OFFICER: Any questions based on what I have brought up?

* * * *

[514] HEARING OFFICER: Before I get to that, hasn't the subpoena been received into evidence or has it?

MR. FITZGERALD: I don't believe so. I don't recall offering it.

HEARING OFFICER: I know I made—off the record.

(Discussion held off the record.)

HEARING OFFICER: Back on the record.

MR. FITZGERALD: Mr. Hearing Officer, in an off the Record comment I stated I was not going to ask for compliance on enforcement of the subpoena in this sense that Mr. Fulton's salary or wages and travel or other expenses paid because I submit that the Record reflects the Company's argument relates itself to efficiency and economy and I submit that it's not the function or obligation of Local 134 to introduce the documentary evidence to verify actual cost figures.

I submit though that—in that sense the Company has seen fit not to introduce the total Company records which would in our opinion be the best evidence that any testimony in this regard, that is economy or efficiency, to the Company [515] should not be considered by the Board so I am going to again move that that testimony be stricken and not considered by the Board.

HEARING OFFICER: All right, I am going to deny the motion to strike and I assume the Board will of course give consideration to your argument, the weight of his testimony on expenses.

MR. FITZGERALD: Okay, thank you.

* * * *

[582] HEARING OFFICER: Very good—very good. Every body rests at this point?

MR. SCHUR: Yes.

MR. FITZGERALD: Subject to my last discussion on that point.

HEARING OFFICER: Oh, which one?

MR. FITZGERALD: About the unavailability of witnesses.

HEARING OFFICER: All right.

Do any of the parties wish oral argument?

MR. O'BRIEN: No, as far as the Employer is concerned.

HEARING OFFICER: Mr. Fitzgerald?

[583] MR. FITZGERALD: I think there is enough here we should have written briefs.

* * * *

HEARING OFFICER With regard to filing, Section 10135 of the Board's procedure the parties have seven days after the close of the hearing subject to any extentions that may be granted to file briefs with the Board and request oral argument which the Board may or may not grant.

I interpret that section as empowering me to grant such extensions of time to file briefs as may be requested beyond the seven days.

Now, the question is whether you consider seven days sufficient for your purposes—if not, I shall grant an extension of time not to exceed an additional 14 days.

* * * *

[584] HEARING OFFICER: Is everyone willing to file briefs in seven days?

MR. FITZGERALD: I submit with the size of this Record that at least the two attorneys for the labor organizations feel that 21 days is a reasonable length of time to request for the filing of Briefs and I believe that we decided about April 8th.

MR. O'BRIEN: We will join in that request of Mr. Fitzgerald.

HEARING OFFICER: And Mr. Schur, will you join?

MR. SCHUR: I think Mr. Fitzgerald has accurately stated my position.

HEARING OFFICER: All right, briefs are due April 8th.

Any request for an extension of time after the close of hearing must be filed with the Board and—in Wash-

ington not later than three days before the date briefs are due and sufficient request must be written and copies must be served immediately upon each of the other parties.

Anything further at this time?

MR. O'BRIEN: Nothing further.

HEARING OFFICER: Anything further, Mr. Fitzgerald?

[585] MR. FITZGERALD: No.

HEARING OFFICER: Mr. Schur?

MR. SCHUR: No.

HEARING OFFICER: There being nothing further, the hearing is closed.

(Whereupon, the hearing in the above entitled matter was closed.)

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1313

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION, COMMUNICATIONS EQUIPMENT AND SYSTEMS DIVISION, PETITIONER

v.

LOCAL 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, ET AL.[1]

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (A. 63-71)[2] is reported at 486 F. 2d 863. The decision and order of the National Labor Relations Board in the unfair labor practice proceeding (A. 34-54) are reported at 197 NLRB No. 127. The Board's earlier decision

[1] The other parties to the case are the National Labor Relations Board and Communications Workers of America, AFL-CIO.

[2] "A." refers to the separate appendix printed by the Company. "S.A." refers to the supplemental appendix printed by the Board.

and determination of dispute (A. 9–24) are reported at 191 NLRB 828.

JURISDICTION

The judgment of the court of appeals was entered on September 20, 1973 (A. 72). Timely petitions for rehearing *en banc* filed by the Board, the Company, and the Communications Workers of America, AFL–CIO were denied on November 26, 1973 (A. 2, 73). The petition for a writ of certiorari was filed on February 25, 1974, and granted on May 13, 1974 (A. 80). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), the Administrative Procedure Act (5 U.S.C. 551, *et seq.*), and the Board's Rules and Regulations (29 C.F.R. 102.1, *et seq.*) are set forth in the Appendix, *infra*, pp. 31–46.

QUESTIONS PRESENTED

1. Whether a proceeding to determine a jurisdictional dispute under Section 10(k) of the National Labor Relations Act must be conducted in accordance with the provisions of the Administrative Procedure Act applicable to "adjudications."

2. Whether the prosecution of a Section 8(b)(4)(D) unfair labor practice case by the same Board agent who presided at a prior Section 10(k) hearing involving the jurisdictional dispute giving rise to the unfair labor practice case invalidated the Board proceedings.

STATEMENT

A. INTRODUCTION

Section 8(b)(4)(D) of the National Labor Relations Act makes it an unfair labor practice for a labor organization to exert strike pressure to compel an employer to assign particular work to one group of employees rather than to another group of employees. Unlike the statutory procedure governing other unfair labor practice charges—where an unfair labor practice complaint is promptly issued when there is reasonable cause to believe that the charge is true (Section 10(b), 29 U.S.C. 160(b))—the Act suspends the unfair labor practice proceeding on a meritorious Section 8(b)(4)(D) charge to permit a resolution of the jurisdictional dispute which gave rise to the charge. Section 10(k) of the Act empowers and directs the Board—

> to hear and determine the dispute out of which such unfair labor practice shall have arisen unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

Under procedures which the Board formulated just after Sections 8(b)(4)(D) and 10(k) were enacted in 1947, the Board's regional director—if he finds that an

8(b)(4)(D) charge has merit and that no satisfactory evidence has been presented that the underlying dispute has been or will be voluntarily adjusted—serves on all parties to the dispute "a notice of hearing under section 10(k) of the act before a hearing officer at a time and placed fixed therein." The notice of hearing contains "a simple statement of the issues involved in such dispute." (29 C.F.R. 102.90, *infra*, pp. 34–35.) The hearing procedure conforms, insofar as applicable, to that utilized in determining representation questions under Section 9(c) of the Act, 29 U.S.C. 159(c). The hearing officer "normally is an attorney or field examiner attached to the regional office" (29 C.F.R. 101.20(c)). "The hearing is nonadversary in character, and the primary interest of the hearing officer is to insure that the record contains as full a statement of the pertinent facts as may be necessary for a determination of the issues by the Board" (29 C.F.R. 101.34, *infra*, p. 39). "All parties are afforded full opportunity to present their respective positions and to produce evidence in support of their contentions"; they are also "permitted to argue orally on the record before the hearing officer" (*ibid.*). "At the close of the hearing, the case is transmitted to the Board for decision. The hearing officer prepares an analysis of the issues and the evidence, but makes no recommendations in regard to resolution of the dispute" (*ibid.*).

The parties may "file briefs with the Board and * * * request oral argument which the Board may or may not grant. * * * The Board then considers the

evidence taken at the hearing and the hearing officer's analysis together with any briefs that may be filed and the oral argument, if any, and issues its determination or makes other disposition of the matter." (29 C.F.R. 101.35, *infra*, pp. 39–40.) If the parties subsequently submit satisfactory evidence that they have complied with the determination, the regional director dismisses the 8(b)(4)(D) charge (29 C.F.R. 101.36, *infra*, p. 40). If the regional director "is not satisfied that the parties are complying, he issues a complaint and notice of hearing, charging violation of section 8(b)(4)(D) of the act, and the proceeding follows the procedure" utilized for any other unfair labor practice case (*ibid.*).[3]

The hearing in the 8(b)(4)(D) case is conducted in conformity with the procedures for cases of adjudication prescribed by the Administrative Procedure Act: "A duly designated administrative law judge presides over the hearing. The Government's case is conducted by an attorney attached to the Board's regional office, who has the responsibility of presenting the evidence in support of the complaint. * * * Counsel for the general counsel, all parties to the proceeding, and the administrative law judge have the power to call, examine, and cross-examine witnesses and to introduce evidence into the record" (29 C.F.R. 101.10(a)). At the conclusion of the hearing, the administra-

[3] "However, if the Board determines that employees represented by a charged union are entitled to perform the work in dispute, the regional director dismisses the charge against that union irrespective of whether the employer complies with the determination" (29 C.F.R. 101.26, *infra*, p. 40).

tive law judge prepares a recommended decision, to which the parties may file exceptions with the Board (29 C.F.R. 101.11). If exceptions are filed, the Board reviews the entire record, and then "issues its decision and order in which it may adopt, modify, or reject the findings and recommendations of the administrative law judge" (29 C.F.R. 101.12).[4]

If the Board finds that the union charged in the complaint has violated Section 8(b)(4)(D) of the Act and issues a remedial order, that order can be reviewed in the appropriate court of appeals under Section 10(e) or (f) of the Act (29 U.S.C. 160(e) or (f), *infra*, pp. 32–33). "The record of the proceeding under section 10(k) and the determination of the Board thereon," which becomes a part of the record in the unfair labor practice proceeding, is subject to judicial review at the same time (29 C.F.R. 102.92, *infra*, p. 36).

B. THE BOARD PROCEEDINGS IN THE PRESENT CASE

1. THE WORK DISPUTE

On August 27, 1970, petitioner Company (ITT) executed a contract with the Village of Elk Grove, Illinois, to install, test, and maintain a private telephone system in the Elk Grove Village Firehouse and City Administration offices. Installation of the equipment involved two phases: "pulling cable," which

[4] "The Board does not consult with members of the [administrative law judge's staff of the division of judges] or with any agent of the general counsel in its deliberations" (29 C.F.R. 101.12).

entailed routing telephone cables from a central telephone room to the telephone instruments located throughout the building; and "terminating the cable," which involved installing a PBX telephone switch system, testing equipment, identifying and connecting telephone wires contained in cables, and installing the telephone instruments to these wires. ITT subcontracted the work of "pulling cable" to C. A. Riley Electric Construction Co. (Riley), whose employees were represented by Local 134, International Brotherhood of Electrical Workers, AFL–CIO ("Local 134"); "terminating the cable" work was assigned to ITT's employees, who were represented by the Communications Workers of America, AFL–CIO ("CWA"). (A. 12, 36.)

Shortly after the assignment of work, ITT officials, at the request of the president of Riley, met with the Local 134 business agent who indicated that, in the past, the Cook County Building Trades Council had threatened to stop Cook County projects if "non-union" men were used, and that "CWA was not recognized in Cook County and CWA would install no telephone equipment in Cook County" (A. 37). At a subsequent meeting with ITT officials, the business agent repeated the history of past Council action, and warned, " 'we better get that work or there will be trouble' " (A. 37–38).

On December 3, 1970, ITT employees reported to the jobsite to begin "terminating the cable." When they arrived, employees of Illinois Bell Telephone Co. and Johnson Electric Co., both represented by Local

134, were already at work. A Local 134 steward asked to see the union cards of the ITT employees. When shown a CWA card, the steward turned to the Johnson Electric employees and announced "we can't work here." These employees, together with the Local 134 steward, left their job stations and retired to have coffee outside the building. While the employees were having coffee, the Local 134 steward announced to them, "[am leaving because I do not care] to work with 'non-union' men." All Local 134 employees then left the jobsite. (A. 39–40.)

That afternoon the general contractor of the project contacted ITT officials and secured their agreement to remove ITT employees the following day. This information was conveyed to the Local 134 steward by his employer. The next day the steward and all other employees returned to work. (A. 40–41.) [5]

2. THE SECTION 10(k) PROCEEDING

On December 3, 1970, ITT filed unfair labor practice charges with the Board alleging that Local 134 had violated Section 8(b)(4)(D) of the Act by engaging in strike pressure to force ITT to assign work to members of Local 134 rather than to employees of ITT represented by CWA. (A. 41). The Board's regional director found reasonable cause to believe the charges had merit and, pursuant to Section 10(k) of the Act, issued a notice of hearing to determine the dispute out of which the alleged unfair labor practice

[5] Subsequently, after Johnson Electric and Illinois Bell had completed their work at the project, ITT's employees returned to the jobsite and completed the work of terminating the cable (A. 41).

arose (A. 4–5). On March 12, 15, and 17, 1971, a hearing was held before a hearing officer, an employee of the regional office. At the hearing, ITT and the competing unions appeared, and were given full opportunity to examine and cross-examine witnesses and to adduce evidence. Thereafter, they filed briefs in support of their positions, and the case was transmitted to the Board for decision. (A. 9.)

On June 30, 1971, the Board issued its Decision and Determination of Dispute (A. 9–24). After weighing all the pertinent factors in the light of the record evidence, the Board concluded that ITT's employees represented by CWA were entitled to perform the disputed work of terminating the cable (A. 21–23).[6] The Board directed Local 134 to notify the regional director within 10 days whether it would comply with the Board's determination of the dispute (A. 23–24). Local 134 moved the Board to reconsider its determination, but the Board denied the motion on the ground that it presented "nothing not previously considered" (A. 1).

3. THE UNFAIR LABOR PRACTICE PROCEEDING

On August 30, 1971, Local 134 notified the regional director that it would not comply with the Board's 10 (k) determination (A. 42). Consequently, the regional

[6] The Board relied, *inter alia*, on these factors: (1) ITT and CWA were parties to a contract covering the disputed work; (2) the particular skills and training required to install PBX systems were possessed by ITT's employees; (3) efficiency and economy of operations would result from use of ITT's employees; (4) industry and employer practices favored awarding the work to ITT's employees (A. 16–21).

director, on behalf of the Board's General Counsel, issued a complaint upon the 8(b)(4)(D) unfair labor practice charges which had been held in abeyance pending an effort to resolve the underlying dispute pursuant to Section 10(k) (A. 25–31).

A hearing on the unfair labor practice complaint was held before an Administrative Law Judge[7] on November 4, 1971 (A. 34–35). Counsel for the General Counsel was the same individual who served as hearing officer at the 10(k) hearing (A. 9, 34). At the hearing, all parties—the General Counsel, ITT, and the two unions—were afforded full opportunity to adduce evidence, to produce and cross-examine witnesses; and subsequently all filed briefs with the Administrative Law Judge (A. 35).

On February 7, 1972, the Administrative Law Judge issued his decision, finding that Local 134 had violated Section 8(b)(4)(D) of the Act by threatening ITT, and inducing employees of neutral employers to cease working, with the object of forcing ITT to assign the disputed work to employees represented by Local 134 rather than to ITT employees represented by CWA (A. 46–47). The Law Judge recommended that Local 134 be ordered to cease its unlawful conduct (A. 47–50).

Local 134 filed exceptions with the Board urging, *inter alia*, that the complaint be dismissed because the participation of the same individual as hearing officer in the 10(k) proceeding and counsel for the General

[7] The title of "Trial Examiner" was changed to "Administrative Law Judge," as of August 19, 1972 (37 Fed. Reg. 16787).

Counsel in the unfair labor practice proceeding violated the Administrative Procedure Act prohibition (n. 8, *infra*) against combining prosecutorial and judicial functions. The Board, with modifications not relevant here, affirmed the decision of the Administrative Law Judge and adopted his recommended order (A. 51–55).

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals found that the Board's decision was "supported by the controlling facts of the case" (A. 68). It concluded, however, that Section 554 of the Administrative Procedure Act (5 U.S.C. 554) was applicable to Section 10(k) proceedings, and that the dual roles played by the hearing officer violated "the spirit and the letter of the Act" [8] and were "incompatible with the accepted norms for the proper administration of justice" (A. 71). The court held that "[a]n order of the Board thus tainted should not be enforced" (*ibid.*).

SUMMARY OF ARGUMENT

I

The holding of the court below that the ban on combining the functions of prosecutor and judge, imposed by Section 554 of the Administrative Procedure

[8] Section 554(d) in relevant part, provides that "[a]n employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review * * * except as witness or counsel in public proceedings. * * *"

Act, is applicable to a Board proceeding to determine a jurisdictional dispute under Section 10(k) of the National Labor Relations Act is erroneous. Section 554(a) applies only in a "case of adjudication required by statute to be determined on the record after opportunity for an agency hearing." A Section 10(k) proceeding is not an "adjudication," as that term is defined by the Administrative Procedure Act (Section 551(7) and (6)), for it does not lead to an "order" which is a "final disposition" by the Board of the matter for which its processes have been invoked. *Bricklayers Union* v. *National Labor Relations Board,* 475 F. 2d 1316, 1318–1321 (C.A.D.C.). As this Court recognized in *National Labor Relations Board* v. *Plasterers' Union No. 79,* 404 U.S. 116, 122, n. 10: "The § 10(k) determination is not binding as such even on the striking union. If that union continues to picket despite an adverse § 10(k) decision, the Board must prove the union guilty of a § 8(b)(4)(D) violation before a cease-and-desist order can issue."

A Section 10(k) determination is not subject to the provisions of the Administrative Procedure Act governing adjudications for the further reason that the National Labor Relations Act does not require that it be made "on the record" of the hearing. The fact that the Board, by regulation, has provided for "on the record" determinations does not alter this conclusion. For, "any agency is free under the [Administrative Procedure] Act to accord litigants appearing before it more procedural rights than the Act requires." *United States* v. *Florida East Coast Railway Co.,* 410 U.S. 224, 236, n. 6.

Practical considerations confirm the reasonableness of the Board's long-standing view (see *Marine Cooks and Stewards (Irwin-Lyons Lumber Co.)*, 83 NLRB 341 that the Administrative Procedure Act provisions governing adjudications are not applicable to a Section 10(k) proceeding. If those provisions were applicable, the hearing could only be held before an Administrative Law Judge appointed under special procedures; he would have to prepare an initial decision, after affording the parties an opportunity to submit proposed findings and conclusions; and there could be no Board review until the parties had a further opportunity to file exceptions to that decision. These procedural requirements, which are appropriate for an adversary, trial-type proceeding, which turns largely on credibility determinations, serve no useful purpose in a Section 10(k) proceeding which is essentially investigatory and non-adversary, like a Board representation proceeding. On the other hand, to burden a Section 10(k) proceeding with these requirements would only impair Congress' objective of attaining "as expeditious a resolution of the jurisdictional dispute as is reasonably possible." *Bricklayers Union v. National Labor Relations Board, supra*, 475 F. 2d at 1321.

II

The view of the court below that the Board agent's dual role in the Section 10(k) and Section 8(b)(4)(D) proceedings was "incompatible with the accepted norms for the proper administration of justice" (A. 71) rests on a misconception of the hearing officer's

function in the 10(k) hearing and the relationship of that hearing to the subsequent unfair labor practice proceeding. The hearing officer's sole function at the 10(k) hearing is "to insure that the record contains as full a statement of the pertinent facts as may be necessary for a determination by the Board" (29 C.F.R. 101.34). "At the close of the hearing, the case is transferred to the Board for decision. The hearing officer prepares an analysis of the issues and the evidence, but makes no recommendations in regard to the resolution of the dispute" (*ibid.*). If a Section 8(b)(4)(D) unfair labor practice proceeding ultimately results and the same person who acted as hearing officer at the 10(k) stage is selected to prosecute the 8(b)(4)(D) complaint, there is little likelihood that he will be called upon to advocate a position based upon his evidentiary rulings at the 10(k) hearing. For the Board's 10(k) determination is not subject to relitigation in the 8(b)(4)(D) proceeding; the basic issue open to litigation is whether the union has in fact engaged in economic pressure for an object proscribed by Section 8(b)(4)(D)—an issue which was considered only preliminarily in the 10(k) proceeding.

ARGUMENT

I. A PROCEEDING TO DETERMINE A JURISDICTIONAL DISPUTE UNDER SECTION 10(k) OF THE NATIONAL LABOR RELATIONS ACT NEED NOT BE CONDUCTED IN ACCORDANCE WITH THE PROVISIONS OF THE ADMINISTRATIVE PROCEDURE ACT APPLICABLE TO "ADJUDICATIONS"

Section 554 of the Administrative Procedure Act (hereafter "A.P.A."), together with Sections 556, and

557,[9] is, with six enumerated exceptions,[10] applicable "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing." We shall show below that, contrary to the view of the court of appeals, Section 554 is not applicable to a Section 10(k) proceeding.[11]

A. A SECTION 10(k) DETERMINATION IS NOT AN "ADJUDICATION"

The A.P.A. defines "adjudication" as "agency process for the formulation of an order" (Section 551(7)), and "order" as "the whole or a part *of a final disposition* * * * of an agency in a matter other than rule making * * *" (Section 551(6); emphasis added).

[9] Section 556(a) which, *inter alia*, requires the appointment of a hearing examiner in conformity with 5 U.S.C. 3105 (see *infra*, p. 24), applies "to hearings required by section 553 [rule making] or 554 [adjudications] of this title to be conducted in accordance with this section." Section 557(a), which, *inter alia*, requires the hearing examiner to prepare an initial decision which is subject to review by the agency upon exceptions by the parties, applies "when a hearing is required to be conducted in accordance with section 556 of this title."

[10] One exception is "the certification of worker representatives."

[11] The court below stated (A. 70): "It is apparently admitted that § 554 applies to § 10(k) hearings." It added (*id.* at n. 3): "We assume that the § 10(k) hearing officer in this case is the equivalent of a hearing examiner for purposes of § 556, inasmuch as the statute so requires and no point was made of any distinction, either at the hearing or on appeal." However, the Board, ITT, and CWA all argued that the provisions of the Administrative Procedure Act respecting adjudications were inapplicable to a Section 10(k) proceeding. See Board's C.A. Br. 29–31, and n. 33. Indeed, the Board sent the court, prior to its decision, a copy of the opinion in *Bricklayers Union* v. *National Labor Relations Board*, 475 F. 2d 1316 (C.A.D.C.), discussed *infra*.

"Thus, investigatory proceedings, no matter how formal, which do not lead to the issuance of an order containing the element of final disposition as required by the definition, do not constitute adjudication." Attorney General's Manual on the Administrative Procedure Act 40 (1947). As the Court of Appeals for the District of Columbia Circuit correctly concluded, in finding the adjudication provisions of the A.P.A. inapplicable to a Section 10(k) proceeding, such a proceeding does not lead to an "order" which is a "final disposition" by the Board of the matter for which its processes have been invoked. *Bricklayers Union v. National Labor Relations Board, supra,* 475 F. 2d at 1318–1321.

The Board reached the same conclusion shortly after Section 10(k) was enacted. In rejecting a contention that Section 8 of the A.P.A. (now Section 557) was applicable to a 10(k) proceeding, it stated:

> Under Section 202.32 of the Board's Rules and Regulations—Series 5, as amended, the hearing under Section 10(k) is nonadversary in character, and according to the procedure adopted therefor, conducted in the same way as a hearing in a representational proceeding. The Board adopted such procedure because the decision in the proceedings under Section 10(k) is a preliminary administrative determination made for the purpose of attempting to resolve a dispute within the meaning of that section; the unfair labor practice itself is litigated at a subsequent hearing before a Trial Examiner in the event the dispute remains unresolved. It is to the subsequent adversary hearing, which

> leads to a final Board adjudication, that Section 8 of the Administrative Procedure Act applies. [*Marine Cooks and Stewards (Irwin-Lyons Lumber Co.)*, 83 NLRB 341.] [12].

Similarly, this Court observed in *National Labor Relations Board* v. *Plasterers' Union No. 79*, 404 U.S. 116, 122, n. 10:

> The § 10(k) determination is not binding as such even on the striking union. If that union continues to picket despite an adverse § 10(k) decision, the Board must prove the union guilty of a § 8(b)(4)(D) violation before a cease-and-desist order can issue. The findings and conclusions in a § 10(k) proceeding are not *res judicata* on the unfair labor practice issue in the later § 8(b)(4)(D) determination. *International Typographical Union*, 125 N.L.R.B. 759, 761 (1959). Both parties may put in new evidence at the § 8(b)(4)(D) stage, although often * * * the parties agree to stipulate the record of the § 10(k) hearing as a basis for the Board's determination of the unfair labor practice. Finally, to exercise its powers under § 10(k), the Board need only find that there is reasonable cause to believe that a § 8(b)(4)(D) violation has occurred, while in the § 8(b)(4)(D) proceeding itself the Board must find by a preponderance of the evidence that the picketing union has violated § 8(b)(4)(D).* * *

To be sure, "the impact of the § 10(k) decision is felt in the § 8(b)(4)(D) hearing because for all practical purposes the Board award determines who will

[12] See also *International Longshoremen's and Warehousemen's Union (General Ore, Inc.)*, 124 NLRB 626, 628–629.

prevail in the unfair labor practice proceeding" (*National Labor Relations Board* v. *Plasterers' Union No. 79, supra,* 404 U.S. at 126–127). But the function of the Section 10(k) decision is merely to set in motion the machinery for determining whether a complaint under Section 8(b)(4)(D) should issue:

> If the picketing union persists in its conduct despite a § 10(k) decision against it, a § 8(b)(4)(D) complaint issues and the union will likely be found guilty of an unfair labor practice and be ordered to cease and desist. On the other hand, if that union wins the § 10(k) decision and the employer does not comply, the employer's § 8(b)(4)(D) case evaporates and the charges he filed against the picketing union will be dismissed. Neither the employer nor the employees to whom he has assigned the work are legally bound to observe the § 10(k) decision, but both will lose their § 8(b)(4)(D) protection against the picketing which may, as it did here, shut down the job. The employer will be under intense pressure, practically, to conform to the Board's decision. This is the design of the Act; Congress provided no other way to implement the Board's § 10(k) decision. [*Id.* at 127; footnote omitted.]

That a Section 10(k) determination is not final agency action which culminates in an order is confirmed by the court holdings that such a determination is not directly reviewable in the court of appeals under Section 10(e) or (f) of the Act, 29 U.S.C. 160(e) or (f);[13] it is reviewable only on review of a

[13] That section provides for review only of "a final order of the Board." That phrase "'refers solely to an order of the Board

Section 8(b)(4)(D) order. *Shell Chemical Co.* v. *National Labor Relations Board*, 86 LRRM 2708, 2710–2713 (C.A. 5); *Manhattan Construction Co.* v. *National Labor Relations Board*, 198 F. 2d 320 (C.A. 10); *Trane Co.* v. *National Labor Relations Board*, 68 LRRM 3024 (C.A. 6); *Rafel & Co.* v. *Local No. 9, International Brotherhood of Electrical Workers*, 47 LRRM 2897 (C.A. 7), certiorari denied, 366 U.S. 948; *Henderson* v. *International Longshoremen's Union Local 50*, 457 F. 2d 572, 574, 577–578 (C.A. 9), certiorari denied, 409 U.S. 852; *contra: Waterway Terminals Co.* v. *National Labor Relations Board*, 467 F. 2d 1011 (C.A. 9). Cf. *National Labor Relations Board* v. *Local 991, International Longshoremen's Association*, 332 F. 2d 66, 69–71 (C.A. 5). As the Fifth Circuit stated in *Shell Chemical, supra*, 86 LRRM at 2712–2713:

> In this regard, the non-reviewable nature of a section 10(k) proceeding is like the representational certification procedure of section 9. A Board certification of a union as an employee bargaining representative is only reviewable if the employer refuses to bargain and an order under section 8(a)(5) issues from an unfair labor practice proceeding. The certification itself is not reviewable. *American Federation of Labor* v. *NLRB*, *supra*, 308 U.S. at 408–412.

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either dismissing a complaint in whole or in part or directing a remedy for the unfair labor practices found—in either case an order entered as the culmination of the [unfair labor practice] procedure described in Section 10(b) and (c) of the Act [29 U.S.C. 160(b) and (c)].'" *Laundry Workers* v. *National Labor Relations Board*, 197 F. 2d 701, 703 (C.A. 5). See also *American Federation of Labor* v. *National Labor Relations Board*, 308 U.S. 401, 405–408.

Finally, there is a strong "similarity between the nature of a Section 9 representation proceeding"—which is admittedly exempt from Section 554 and the other provisions of the A.P.A. governing adjudications—"and a proceeding under section 10(k)." *Bricklayers Union* v. *National Labor Relations Board, supra,* 475 F. 2d at 1319.[14] Indeed, "the Board adopted the same practice in section 10(k) hearings [see *supra,* pp. 16–17] shortly after that section followed section 9 into the Act, subsequent to the enactment of the A.P.A."[15] *Id.* at 1319–1320. Thus, both proceedings are essentially investigatory and non-adversary.[16] The evidentiary material, in both, relates primarily to economic facts such as the nature of the employer's business, the duties of certain employees, and the history of collective bargaining. And, in both, issues of credibility are rarely

[14] While Section 554 of the A.P.A. specifically excludes a "certification of worker representatives" (n. 10, *supra*), this exclusion was not necessary since the non-final, investigative nature of a representation proceeding would, in any event, have removed it from the category of an adjudication. "'[T]his exclusion may have been due simply to recognition that such certification, which 'rests so largely upon an election or the availability of an election,' had previously been held by the Supreme Court not to be adjudicatory like a final order of the Board in an unfair labor practice proceeding. *American Federation of Labor* v. *NLRB*, 308 U.S. 401, 408–412 * * * (1940)." *Bricklayers Union* v. *National Labor Relations Board, supra,* 475 F. 2d at 1319 (footnotes omitted).

[15] Section 10(k) was added to the National Labor Relations Act in June 1947, approximately one year after the A.P.A. was enacted.

[16] This Court, in *Plasterers' Union, supra,* described the 10(k) hearing as "a comparative proceeding aimed at determining which union is entitled to perform certain tasks" (404 U.S. at 135).

presented.[17] The legislative history of the A.P.A. indicates that the procedures governing adjudications were not directed at proceedings of this type, but rather at those, like an unfair labor practice proceeding, which are accusatory or prosecutory in nature.[18]

B. A SECTION 10(k) DETERMINATION IS NOT REQUIRED BY STATUTE TO BE MADE "ON THE RECORD AFTER OPPORTUNITY FOR AN AGENCY HEARING"

An "adjudication" is subject to Section 554 and related provisions of the A.P.A. only if some other statute[19] requires that it be made "on the record

[17] See Attorney General's Committee on Administrative Procedure in Government Agencies, Monograph No. 5, S. Doc. No. 10, 77th Cong., 1st Sess., Pt. 5, 35, n. 144: *Utica Mutual Insurance Co.* v. *Vincent*, 375 F. 2d 129, 134 (C.A. 2), certiorari denied, 389 U.S. 839; 93 Cong. Rec. 6452–6453, 6506, 2 Legislative History of the Labor Management Relations Act, 1947 (G.P.O. 1948) (hereafter "Leg. Hist., 1947"), 1554, 1585 (remarks of Senators Morse and Murray criticizing deletion of the provision which would have permitted the Board to appoint an arbitrator to decide jurisdictional disputes).

[18] Carl McFarland, a member of the Attorney General's Committee which initially drafted and proposed legislation leading to the A.P.A., testified:

"Now, to repeat, there are two kinds of administrative operations, the legislative operation called rule making which we have discussed, and adjudication which is sometimes called an accusatory procedure. That is a procedure where an agency comes forward and points its finger to a given person or to a company and says, 'You have sinned and we will proceed to try you.'" (S. Doc. No. 248, 79th Cong., 2d Sess. 78.)

See also *id.* at 24, 79, 225, 353; Attorney General's Manual, *supra*, 14–15.

[19] Or the due process clause of the Constitution. See *Wong Yang Sung* v. *McGrath*, 339 U.S. 33.

after opportunity for an agency hearing." The legislative history [of the A.P.A.] makes clear that the word 'statute' was used deliberately so as to make sections 5, 7, and 8 [Sections 545, 556 and 557] applicable only where the Congress has otherwise *specifically* required a hearing to be held." Attorney General's Manual, *supra,* 41; see also A.P.A. Leg. Hist., 79th Cong., pp. 22, 79, 226, 260, 359 (1944–1946). Moreover, the statute must provide not only for a hearing, but that the decision be "on the record." See *United States* v. *Allegheny-Ludlum Steel Corp.,* 406 U.S. 742, 756–757; *United States* v. *Florida East Coast Railway Co.,* 410 U.S. 224, 236–237 (49 U.S.C. 1(14)(a), authorizing the Interstate Commerce Commission "after hearing * * * [to] establish reasonable rules, regulations, and practices with regard to car service," does not require that such rules "be made on the record"; accordingly, the provisions of Sections 556 and 557 of the A.P.A. are inapplicable to such rule making proceedings[20]). See also 2 Davis, *Administrative Law Treatise,* § 13.08, pp. 225, 229 (1958).

Section 10(k) states only that the Board is "empowered and directed to hear and determine the dispute"; it contains no requirement that the determination be made "on the record."[21] Moreover, the nature

[20] Sections 556 and 557 are applicable only through Section 553 (dealing with rule making) and Section 554 (dealing with adjudications). Section 553(c), like Section 554, makes them applicable only if a statute requires that the determination be made "on the record after opportunity for an agency hearing."

[21] By contrast, Section 9(c)(1), 29 U.S.C. 159(c)(1), states that, if the Board finds that an election petition presents a question of representation affecting commerce, it "shall provide

of the determination is such that neither the Constitution (see n. 19, *supra*) nor general legal principles would import a record requirement into Section 10(k). See *National Labor Relations Board* v. *Radio Engineers Union, Local 1212*, 364 U.S. 573, 583 ("Experience and common sense will supply the grounds for the performance of this job which Congress has assigned the Board"). This conclusion is reinforced by the fact that the parties are encouraged to adopt, in lieu of a determination under Section 10(k), "methods for the voluntary adjustment of" the dispute, and such methods are likely to be arbitration or other similar informal procedures.

Nor is a different conclusion necessitated by the fact that the Board, by regulation (*supra*, pp. 4–5), has provided for on the record determinations where the Board is required to make a determination under Section 10(k). For, as this Court explained:

> [S]ince any agency is free under the [Administrative Procedure] Act to accord litigants appearing before it more procedural rights than

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for an appropriate hearing upon due notice," and, if it "finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and certify the results thereof." Similarly, Section 10(b) and (c), 29 U.S.C. 160(b) and (c), provides for a hearing on an unfair labor practice complaint "before the Board or a member thereof, or before a designated agent or agency," and that, "[i]f upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint" has engaged in the unfair labor practice alleged, "then the Board shall state its findings of fact and shall issue and cause to be served on such person" an appropriate remedial order.

> the Act requires, the fact that an agency may choose to proceed under §§ 556 and 557 does not carry the necessary implication that the agency felt it was required to do so. [*United States* v. *Florida East Coast Railway Co.*, *supra*, 410 U.S. at 236, n. 6.]

Accordingly, even if, contrary to our contention, *supra*, pp. 15–21, a Section 10(k) determination were an "adjudication," it would still not be subject to Section 554 and related provisions of the A.P.A. because the National Labor Relations Act does not require that the determination be made "on the record after opportunity for an agency hearing."

C. TO SUBJECT A SECTION 10(k) PROCEEDING TO THE ADMINISTRATIVE PROCEDURE ACT'S REQUIREMENTS FOR AN "ADJUDICATION" WOULD MAKE THAT PROCEEDING UNNECESSARILY CUMBERSOME AND IMPAIR CONGRESS' OBJECTIVE OF ACHIEVING AN EXPEDITIOUS RESOLUTION OF JURISDICTIONAL DISPUTES

If a Section 10(k) proceeding were deemed to be an adjudication within the meaning of Section 554 of the A.P.A., it would follow that, not only the requirements of that section, but also those of Sections 556 and 557 would be applicable to that proceeding (see n. 9, *supra*). This would mean, *inter alia*, that the employee who presides at the reception of evidence must be a hearing examiner (now Administrative Law Judge, see n. 7, *supra*) appointed under 5 U.S.C. 3105;[22] he must prepare an initial or recommended

[22] This and related sections provide for hearing examiners whose eligibility, promotion, and removal are regulated by the Civil Service Commission. These examiners "shall be assigned cases in rotation so far as practicable, and may not perform duties inconsistent with their duties and responsibilities as hearing examiners."

decision, but only after the parties had an opportunity to file proposed findings and conclusions, together with supporting reasons; and, after issuance of his decision, the parties must be permitted to file exceptions with the agency, together with supporting reasons. Moreover, the record would have to show the ruling upon each finding, conclusion, or exception presented.

These safeguards, which are appropriate for an adversary, trial-type proceeding, which turns largely on credibility determinations would serve no useful purpose in the investigatory, non-adversary Section 10(k) proceeding. On the other hand, to burden a Section 10(k) proceeding with those requirements—*e.g.*, awaiting the availability of an Administrative Law Judge, and precluding the Board from making a determination until he had obtained proposed findings and conclusions and then prepared an initial or recommended decision—would impair Congress' objective of attaining "as expeditious a resolution of the jurisdictional dispute as is reasonably possible." *Bricklayers Union v. National Labor Relations Board, supra,* 475 F. 2d at 1321.[23] See also S. Rep. No. 105, 80th Cong., 1st Sess. (Pt. 1) 27, 1 Leg. Hist., 1947, 433.

The delay in resolving the jurisdictional dispute would be compounded by the fact that, as shown (*supra,* pp. 15–21), Section 554 and related provisions

[23] In fiscal year 1973, the median time between filing of an unfair labor practice charge and a Board 10(k) determination was 174 days. (In the present case, it was about 6 months. A. 1.) In the same period, the median time between filing of a charge and a Board unfair labor practice decision in a contested case was 356 days.

of the A.P.A. would be applicable to a Section 10(k) proceeding only on the premise that it resulted in an "order." If it did, then a Section 10(k) determination could be directly reviewed in the court of appeals under Section 10(e) or (f) of the National Labor Relations Act, 29 U.S.C. 160(e) or (f) (contrary to present practice, *supra*, pp. 18–19). This, in turn, would create a potential for double review. A person aggrieved by a Section 10(k) determination could obtain court of appeals review of that determination right after its issuance, and further review, perhaps in another court of appeals, in connection with review of the subsequent Section 8(b)(4)(D) order.[24]

These practical considerations confirm the reasonableness of the Board's conclusion that a Section 10(k) proceeding is not subject to the A.P.A.'s requirements for "adjudication."

D. THE BOARD'S CONCLUSION WITH RESPECT TO THE APPLICABILITY OF THE ADMINISTRATIVE PROCEDURE ACT TO SECTION 10(k) IS ENTITLED TO GREAT WEIGHT

The Board's conclusion that Section 554 and related sections of the A.P.A. are inapplicable to a Section 10(k) proceeding was, as shown (*supra*, pp. 16–17), "first adopted by the Board as long ago as 1949 in *Na-*

[24] To avoid this potential for added delay, Congress rejected the provision of the Senate Bill which would have made an arbitrator's 10(k) award directly reviewable in the court of appeals. S. Rep. No. 105, *supra*, at 27, 1 Leg. Hist., at 433; H. Conf. Rep. No. 510, 80th Cong., 1st Sess. 57, 1 Leg. Hist. at 561. Cf. the rejection of the proposal for direct review of Board certifications of bargaining representatives, 93 Cong. Rec. 6444, 2 Leg. Hist. at 1542 (Senator Taft).

tional Union of Maritime Cooks and Stewards (*Irwin Lyons Lumber Co.*), *supra*,[25] repeated in 1959 in *Local 8, Longshoremen* (*General Ore, Inc.*), 124 N.L.R.B. 626, and until now * * * not questioned by courts or Congress."[26] *Bricklayers Union* v. *National Labor Relations Board, supra*, 475 F. 2d at 1321. In these circumstances, the Board's view as to the applicability of the A.P.A. to Section 10(k) proceedings is entitled to great weight. *Udall* v. *Tallman*, 380 U.S. 1, 16–17; *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431, 433–434; *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 210; see also *National Labor Relations Board* v. *Gullett Gin Co.*, 340 U.S. 361, 366.

II. THE PARTICIPATION OF THE SECTION 10(k) HEARING OFFICER IN THE SUBSEQUENT SECTION 8(b)(4)(D) PROCEEDING DID NOT IMPAIR THE FAIRNESS OF THE BOARD PROCEEDINGS

If, as we have shown, Section 554 of the A.P.A. is inapplicable to a Section 10(k) proceeding, the combining of hearing officer and prosecutory functions which occurred in this case did not violate the ban on such combination imposed by that section (n. 8, *supra*). Nor does the combination of adjudicatory and prosecutory functions constitute a denial of due process. See *Marcello* v. *Bonds*, 349 U.S. 302;[27] *Fed-*

[25] See also NLRB 14th Annual Report 99 (1949).

[26] Although Congress amended the Act in 1959, and in so doing revised Section 8(b)(4), no suggestion was made for altering the Board's manner of conducting Section 10(k) proceedings.

[27] The Court distinguished *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, relied on by the court below (A. 68, 69–70), on the

eral Trade Commission v. *Cinderella Career and Finishing Schools, Inc.* 404 F. 2d 1308 (C.A.D.C.); *Pangbourn* v. *Civil Aeronautics Board*, 311 F. 2d 349, 356 (C.A. 1); 2 Davis, *Administrative Law Treatise*, § 13.02, pp. 175, 179–180 (1958).

Nor, contrary to the view of the court below, was the Board agent's dual role in the Section 10(k) and Section 8(b)(4)(D) proceedings "incompatible with the accepted norms for the proper administration of justice" (A. 71). The court's view rests on the assumptions that the "hearing officer's rulings at the § 10(k) hearing largely determine what evidence the Board will have to consider at the Unfair Labor Practice Hearing" (A. 69), and the hearing officer's knowledge that "he will subsequently advocate a position based upon his own evidentiary rulings at the § 10(k) hearing could very well influence his decisions at that hearing" (A. 71). The court has misconceived the hearing officer's role in the 10(k) hearing and the relationship of that hearing to the subsequent unfair labor practice proceeding.

To begin with, the Section 10(k) hearing officer is not "the equivalent of a hearing examiner for purposes of § 556" of the A.P.A. (A. 70, n. 3). Rather, he is usually a regional office employee (*supra*, p. 4). The hearing officer's sole function at the Section 10(k) hearing is "to insure that the record contains as full a statement of the pertinent facts as may be neces-

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ground that the A.P.A.'s ban on combining functions had been found to be applicable to the deportation proceeding in that case. Congress' removal of deportation proceedings from that ban was sustained in *Marcello*, *supra*.

sary for a determination of the issues by the Board" (29 C.F.R. 101.34.[28] "At the close of the hearing, the case is transmitted to the Board for decision. The hearing officer prepares an analysis of the issues and the evidence, *but makes no recommendations in regard to resolution of the dispute*" (*ibid.;* emphasis added).[29] If the Board rejects the work claim of the union exerting economic pressure and it continues such pressure, an 8(b)(4)(D) unfair labor practice proceeding will ensue. But, contrary to the assumption of the court below, if the individual selected to prosecute the unfair labor practice case is the same person who acted as the hearing officer at the 10(k) stage, there is little likelihood that he will be required to "advocate a position based upon his own evidentiary rulings at the § 10(k) hearing" (A. 71). For the Board's 10(k) "entitlement" determination in the underlying jurisdictional dispute is not subject to relitigation in the 8(b)(4)(D) proceeding (see A. 42, n. 4);[30] the basic issue open to litigation is whether the union has in fact engaged in economic pressure for an object prohibited by Section 8(b)(4)(D)—an issue which was

[28] The portions of the 10(k) hearing set forth in the Board's supplemental appendix show that the hearing officer adhered to that role here. See, *e.g.*, S.A. 2, 5, 9, 12–13, 17, 24–25.

[29] As in a representation case, the hearing officer's analysis is not served on the parties and does not constitute part of the record; its only purpose is to aid the Board in its own review of the record. See *International Longshoremen's Union, supra*, 124 NLRB at 829. Cf. *Kearney & Trecker Corp.* v. *National Labor Relations Board*, 209 F. 2d 782 (C.A. 7).

[30] See also *Chicago Typographical Union No. 16 (Central Typesetting Co.)*, 138 NLRB 231, 236; *Local 3, International Brotherhood of Electrical Workers (Western Electric Co.)*, 144 NLRB 1318, 1319, n. 1.

considered only preliminarily in the 10(k) proceeding (see *supra*, p. 17). Moreover, since the hearing officer has no assurance at the time he is conducting that 10(k) proceeding that he will be assigned to prosecute the subsequent 8(b)(4)(D) case,[31] there is little likelihood that he would be thinking of his future participation in the 8(b)(4)(D) case in making rulings in the 10(k) proceeding.

CONCLUSION

The judgment of the court below should be reversed and the case should be remanded to that court with directions to enforce the Board's order.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel,
JOHN S. IRVING,
Deputy General Counsel,
PATRICK HARDIN,
Associate General Counsel,
NORTON J. COME,
Deputy Associate General Counsel,
ALAN D. CIRKER,
Attorney,
National Labor Relations Board.

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[31] The Regional Director does not ordinarily assign the same person to conduct related 10(k) hearings and 8(b)(4) unfair labor practice cases. See *International Longshoremen's Union*, *supra*, 124 NLRB at 628 ("we think it better practice not to assign a Board agent who has previously engaged in the performance of investigative and prosecuting functions for the Agency to act as a hearing officer in the same or in a related case").

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

SEC. 8. * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is: * * * (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: * * *

* * * * *

SEC. 10. * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be

served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: * * *.

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *:

* * * * *

(e) The Board shall have power to petition any court of appeals of the United States * * * within any circuit * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. * * * The findings of the Board with respect to questions of fact if supported by sub-

stantial evidence on the record considered as a whole shall be conclusive. * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. Acopy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner a sin the case of an application by the Boar dunder subsection (c) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modifed, or setting aside in whole or in part the order of the Board: the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * * * *

(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such

charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

The relevant provisions of the National Labor Relations Board Rules and Regulations and Statements of Procedure, Series 8, as amended (29 CFR 102.1, and 101.1, *et seq.*) are as follows:

RULES AND REGULATIONS

SUBPART F—PROCEDURE TO HEAR AND DETERMINE DISPUTES UNDER SECTION 10(k) OF THE ACT

SEC. 102.89 *Initiation of proceedings.*—Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 8(b) of the act, the regional director of the office in which such charge is filed or to which it is referred shall, as soon as possible after the charge has been filed, serve upon the parties a copy of the charge together with a notice of the filing of the charge and shall investigate such charge and if it is deemed appropriate to seek injunctive relief of a district court pursuant to section 10(l) of the act, he shall give it priority over all other cases in the office except other cases under section 10(l) and cases of like character.

SEC. 102.90 *Notice of filing of charge; notice of hearing; hearing; proceedings before the Board; briefs; determination of dispute.*—If it appears to the regional director that the charge has merit and the parties to the dispute have not submitted satisfactory evidence to the regional director that they have adjusted, or

have agreed upon methods for the voluntary adjustment of, the dispute out of which such unfair labor practice shall have arisen, he shall cause to be served on all parties to such dispute a notice of hearing under section 10(k) of the act before a hearing officer at a time and place fixed therein which shall be not less than 10 days after service of the notice of the filing of said charge. The notice of hearing shall contain a simple statement of the issues involved in such dispute. Such notice shall be issued promptly, and, in cases in which it is deemed appropriate to seek injunctive relief pursuant to section 10(l) of the act, shall normally be issued within 5 days of the date upon which injunctive relief is first sought. Hearings shall be conducted by a hearing officer, and the procedure shall conform, insofar as applicable, to the procedure set forth in §§ 102.64 to 102.68, inclusive. Upon the close of the hearing, the proceeding shall be transferred to the Board and the Board shall proceed either forthwith upon the record, or after oral argument, or the submission of briefs, or further hearing, to determine the dispute or make other disposition of the matter. Should any party desire to file a brief with the Board, eight copies thereof shall be filed with the Board at Washington, D.C., within 7 days after the close of the hearing: *Provided, however,* That in cases involving the national defense and so designated in the notice of hearing, no briefs shall be filed, and the parties, after the close of the evidence, may argue orally upon the record their respective contentions and positions: *Provided further,* That, in cases involving the national defense, upon application for leave to file briefs expeditiously made to the Board in Washington, D.C., after the close of the hearing, the Board may for good cause shown grant such leave and thereupon specify the time for

filing. Immediately upon such filing, a copy shall be served on the other parties. Such brief shall be printed or otherwise legibly duplicated: *Provided, however,* That carbon copies of typewritten matter shall not be filed and if submitted will not be accepted. Requests for extension of time in which to file a brief under authority of this section shall be in writing and received by the Board in Washington, D.C., 3 days prior to the due date with copies thereof served on the other parties. No reply brief may be filed except upon special leave of the Board.

SEC. 102.91 *Compliance with determination; further proceedings.*—If, after issuance of the determination by the Board, the parties submit to the regional director satisfactory evidence that they have complied with the determination, the regional director shall dismiss the charge. If no satisfactory evidence of compliance is submitted, the regional director shall proceed with the charge under paragraph (4)(D) of section 8(b) and section 10 of the act and the procedure prescribed in §§ 102.9 to 102.51, inclusive, shall, insofar as applicable, govern: *Provided, however,* That if the Board determination is that employees represented by a charged union are entitled to perform the work in dispute, the regional director shall dismiss the charge as to that union irrespective of whether the employer has complied with that determination.

SEC. 102.92 *Review of determination.*—The record of the proceeding under section 10(k) and the determination of the Board thereon shall become a part of the record in such unfair labor practice proceeding and shall be subject to judicial review, insofar as it is in issue, in proceedings to enforce or review the final order of the Board under section 10(e) and (f) of the act.

SEC. 102.93 *Alternative procedure.*—If, either before or after service of the notice of

hearing, the parties submit to the regional director satisfactory evidence that they have adjusted the dispute, the regional director shall dismiss the charge and shall withdraw the notice of hearing if notice has issued. If, either before or after issuance of notice of hearing, the parties submit to the regional director satisfactory evidence that they have agreed upon methods for the voluntary adjustment of the dispute, the regional director shall defer action upon the charge and shall withdraw the notice of hearing if notice has issued. If it appears to the regional director that the dispute has not been adjusted in accordance with such agreed-upon methods, and that an unfair labor practice within the meaning of section 8(b)(4)(D) of the act is occurring or has occurred, he may issue a complaint under § 102.15, and the procedure prescribed in §§ 102.9 to 102.51, inclusive, shall, insofar as applicable, govern; and §§ 102.90 to 102.92, inclusive, are inapplicable: *Provided, however,* That if an agreed-upon method for voluntary adjustment results in a determination that employees represented by a charged union are entitled to perform the work in dispute, the regional director shall dismiss the charge as to that union irrespective of whether the employer has complied with that determination.

STATEMENTS OF PROCEDURE

SUBPART F—JURISDICTIONAL DISPUTE CASES UNDER SECTION 10(k) OF THE ACT

SEC. 101.31 *Initiation of proceedings to hear and determine jurisdictional disputes under section 10(k).*—The investigation of a jurisdictional dispute under section 10(k) is initiated by the filing of a charge, as described in § 101.2, by any person alleging a violation of paragraph (4)(D) of section 8(b). As soon as possible after a charge has been filed, the re-

gional director serves on the parties a copy of the charge together with a notice of the filing of such charge.

SEC. 101.32 *Investigation of charges; withdrawal of charges; dismissal of charges and appeals to Board.*—These matters are handled as described in §§ 101.4 to 101.7, inclusive. Cases involving violation of paragraph (4)(D) of section 8(b) in which it is deemed appropriate to seek injunctive relief of a district court pursuant to section 10(l) of the act are given priority over all other cases in the office except other cases under section 10(l) of the act and cases of like character.

SEC. 101.33 *Initiation of formal action; settlement.*—If, after investigation, it appears to the regional director that the Board should determine the dispute under section 10(k) of the act, he issues a notice of hearing which includes a simple statement of issues involved in the jurisdictional dispute and which is served on all parties to the dispute out of which the unfair labor practice is alleged to have arisen. The hearing is scheduled for not less than 10 days after service of the notice of the filing of the charge, except that in cases involving the national defense, agreement will be sought for scheduling of hearing on less notice. If the parties present to the regional director satisfactory evidence that they have adjusted the dispute, the regional director withdraws the notice of hearing and either permits the withdrawal of the charge or dismisses the charge. If the parties submit to the regional director satisfactory evidence that they have agreed upon methods for the voluntary adjustment of the dispute, the regional director shall defer action upon the charge and shall withdraw the notice of hearing if issued. The parties may agree on an arbitrator, a proceeding under section 9(c) of the act, or any other satisfatcory method to resolve the dispute. If the agreed-upon method for

voluntary adjustment results in a determination that employees represented by a charged union are entitled to perform the work in dispute, the regional director dismisses the charge against that union irrespective of whether the employer complies with that determination.

SEC. 101.34 *Hearing.*—If the parties have not adjusted the dispute or agreed upon methods of voluntary adjustment, a hearing, usually open to the public, is held before a hearing officer. The hearing is nonadversary in character, and the primary interest of the hearing officer is to insure that the record contains as full a statement of the pertinent facts as may be necessary for a determination of the issues by the Board. All parties are afforded full opportunity to present their respective positions and to produce evidence in support of their contentions. The parties are permitted to argue orally on the record before the hearing officer. At the close of the hearing, the case is transmitted to the Board for decision. The hearing officer prepares an analysis of the issues and the evidence, but makes no recommendations in regard to resolution of the dispute.

SEC. 101.35 *Procedure before the Board.*—The parties have 7 days after the close of the hearing, subject to any extension that may have been granted, to file briefs with the Board and to request oral argument which the Board may or may not grant. However, in cases involving the national defense and so designated in the notice of hearing, the parties may not file briefs but after the close of the evidence may argue orally upon the record their respective contentions and positions, except that for good cause shown in an application expeditiously made to the Board in Washington, D.C., after the close of the hearing, the Board may grant leave to file briefs in such time as it shall specify. The Board then considers the evidence taken at the hearing and the hearing officer's

analysis together with any briefs that may be filed and the oral argument, if any, and issues its determination or makes other disposition of the matter.

SEC. 101.36 *Compliance with determination; further proceedings.*—After the issuance of determination by the Board, the regional director in the region in which the proceeding arose communicates with the parties for the purpose of ascertaining their intentions in regard to compliance. Conferences may be held for the purpose of working out details. If the regional director is satisfied that the parties are complying with the determination, he dismisses the charge. If the regional director is not satisfied that the parties are complying, he issues a complaint and notice of hearing, charging violation of section 8(b)(4)(D) of the act, and the proceeding follows the procedure outlined in sections 101.8 to 101.15, inclusive. However, if the Board determines that employees represented by a charged union are entitled to perform the work in dispute, the regional director dismisses the charge against that union irrespective of whether the employer complies with the determination.

The relevant provisions of the Administrative Procedure Act (5 U.S.C. 551, *et seq.*) are as follows:

§ 551. *Definitions*

For the purpose of this subchapter—

* * * * *

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

* * * * *

§ 554. *Adjudications*

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved—

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a hearing examiner appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of—

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for—

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply—

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

* * * * *

§ 556. *Hearing; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision*

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence—

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more hearing examiners appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may—

(1) administer oaths and affirmations;

(2) issue subpenas authorized by law;

(3) rule on offers of proof and receive relevant evidence;

(4) take depositions or have depositions taken when the ends of justice would be served;

(5) regulate the course of the hearing;

(6) hold conferences for the settlement or simplification of the issues by consent of the parties;

(7) dispose of procedural requests or similar matters;

(8) make or recommend decisions in accordance with section 557 of this title; and

(9) take other action authorized by agency rule consistent with this subchapter.

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

§ 557. Initial decisions; conclusiveness; review by agency; submissions by parties, contents of decisions; record

(a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. When the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearings pursuant to section 556 of this title shall first recommend a decision, except that in rule making or determining applications for initial licenses—

(1) instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision; or

(2) this procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires.

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

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In the

Supreme Court of the United States

OCTOBER TERM, 1973

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION, COMMUNICATIONS EQUIPMENT AND SYSTEMS DIVISION,

Petitioner,

vs.

LOCAL 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF RESPONDENT, LOCAL 134, IBEW

ROBERT E. FITZGERALD
EDWARD J. CALIHAN, JR.
53 W. Jackson Boulevard
Chicago, Illinois 60604
Attorneys for Local 134 IBEW

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF RESPONDENT, LOCAL 134, IBEW

OPINIONS BELOW

Local 134 accepts the statement of OPINIONS BELOW of the National Labor Relations Board (hereinafter Labor Board).

JURISDICTION

Local 134 accepts the statement of JURISDICTION of the Labor Board.

STATUTES AND REGULATIONS INVOLVED

Local 134 accepts the statement of the Labor Board, as to the Statutes and Regulations Involved.

QUESTIONS PRESENTED

The Petition for Writ of Certiorari listed as the Questions Presented the following:

1. Whether the Seventh Circuit properly decided that contrary to the National Labor Relations Board's established procedures, that agency must conduct jurisdictional dispute proceedings under §10(k) of the Labor Management Relations Act in accordance with the provisions of the Administrative Procedure Act applicable to adjudications (§554, §556 and §557).

2. Whether the subsequent prosecution of an unfair labor practice case by the same NLRB attorney who presided at the prior §10(k) hearing is an improper commingling of prosecutorial and adjudicative functions proscribed by §554 of the Administrative Procedure Act.

The Questions Presented section of the Brief by ITT and the Labor Board states these two issues substantially as set out in the Petition for Writ of Certiorari with grammatical changes to enhance their argument.[1]

A derivative question follows from the arguments of the Labor Board, ITT, and CWA, on the issue of whether a jurisdictional dispute being conducted under

[1] CWA attempts, improperly, to add a new question to those which are properly before this Court. Local 134 will not discuss that question, except to note that it is in violation of Rule 40 § 1(d)(2).

§10K is an adjudication within the meaning of the Administrative Procedure Act. That question may be stated as follows: Must the finding by the Seventh Circuit Court of Appeals that the 10K hearing is an adjudication within the meaning of the Administrative Procedure Act, necessarily result in the conclusion that the Labor Board's decision and determination of dispute is a final and appealable order under the review provisions of the APA or under the review provisions of the Labor Management Relations Act.

STATEMENT OF THE CASE

Local 134 accepts the Statement of the Labor Board with the following additions.

Subsequent to the filing of the unfair labor practice charge by ITT, the Labor Board, through its Chicago Office, filed a Petition for Injunction under Section 10(l) of the Labor Management Relations Act (hereinafter LMRA) on December 21, 1970, against Local 134. This action was designated as Case No. 70 C 3190 on the records of the United States District Court for the Northern District of Illinois, Eastern Division. No hearing was held on the Petition for Injunction, nor was an injunction issued by the Court. On January 20, 1971, by agreement of the Labor Board, ITT, CWA, and Local 134 the action was dismissed.

The Hearing Officer at the §10K hearing, quashed the subpoenas served by Local 134 on ITT and CWA, for the production of evidence concerning the execution of the collective bargaining agreement between them, covering the disputed work. The Labor Board relied, at least in part, upon that collective bargaining agreement for

its Determination of Dispute, in which it awarded the work to the CWA members employed by ITT.

In its Petition to set aside the Labor Board Order made to the Court of Appeals for the Seventh Circuit, Local 134 presented seven questions, including the refusal to consider the evidence sought by its subpoenas, as its Statement of Issues (Main A. 78 and 79). Since the Opinion of the Seventh Circuit concerned itself with only some of the issues presented by Local 134, other substantial questions including the question of the refusal to consider that evidence, remain undecided, because of the refusal to enforce the Board order based upon the violation of the Administrative Procedure Act.

Following the issuance of the decision by the Court of Appeals, the Labor Board closed the case file that gave rise to these proceedings. (See Appendix A)[1a]

[1a] The Appendix submitted by ITT, CWA, and Local 134 is cited as Main A, and the Supplemental Appendix of the Labor Board is cited as Supp. A.

SUMMARY OF ARGUMENT

The decision of the Seventh Circuit Court of Appeals should be enforced because it correctly applied the clear and unambiguous language of Section 554 of the Administrative Procedure Act. The prohibition against the commingling of functions, in the agency's adjudicatory and prosecutorial activities is seen from the language of the statute. Also, the Congressional intent is manifest from that language. This Court has so interpreted the language in the case of *Wong Yang Sung* v. *McGrath,* 339 US 33.

The jurisdictional dispute hearings, conducted under Section 10(k) of the Labor Management Relations Act, are an adjudication within the terms of the Administrative Procedure Act. The 10(k) hearing falls within the definition of adjudication as set out in Section 551 of the APA, because it is a part of the agency process for the formulation of an order.

This Court has decided in the *Wyman-Gordon* case, 349 US 759, that the APA's definition of adjudication applies even to the case of a Labor Board representation case hearing held under §9 of the LMRA. This decision renders nugatory the decision by the Court of Appeals for the District of Columbia in the *Bricklayers* case, 475 F2d 1316, which is relied upon for the proposition that the 10(k) hearing is not an adjudication. The basic rationale of the *Bricklayers* case was that the 10(k) hearing is not an adjudication under Section 554 because it is analogous to a Labor Board representation hearing. Since the 10(k) hearing is an adjudication under Section 551 of the APA, it must also qualify under Section 554 if it meets the other elements set out in that section.

This Court held in the *CBS* decision, *NLRB* v. *Radio and Television Broadcasting Engineers Union Local 1212*, that the language of Section 10(k) contains the idea of a hearing. Thus, this Court has held that the 10(k) hearing meets the requirement that the jurisdictional determination be made "on the record" within the meaning of Section 554, contrary to the Labor Board's contention. Further the conclusion of this Court is supported by the analysis of Professor Davis in his work titled Administrative Law Treatise. Professor Davis cites the *Wong* case supra and the *Riss* case 341 US 907, which were the precedent relied upon by the Seventh Circuit in its decision, in the instant case.

The error of ITT, CWA, and the Labor Board is based upon their failure to distinguish between the fact that the 10(k) hearing is an adjudication, within the ambit of the APA, and the right of judicial review set forth in the APA and the Labor Management Relations Act. Since the language of the LMRA does not specify the method by which judicial review may be held for the 10(k) hearing, the Labor Board is free to establish its own rules as to the method by which judicial review may be obtained. The Board has done so, by providing that the 10(k) hearing must become part of the unfair labor practice decision before it is a final order, and thus reviewable under Section 10(f) of the LMRA. This rule is in harmony with the judicial review provisions of the Administrative Procedure Act. Since a valid method for judicial review is established by the Labor Board for its 10(k) hearings, the principle of exhaustion of administrative remedies requires that the method prescribed by the Board be followed. Thus, Local 134's compliance with the Labor Board's method for judicial review is consistent with the

finding that the Section 10(k) hearing is an adjudication under the Administrative Procedure Act.

The finding that the 10(k) hearing is an adjudication does not necessarily result in the conclusion that the agency must assign an administrative law judge to hear those matters. The provisions of Section 554, prohibiting the commingling of functions, is capable of application without the necessity that the provisions of Section 556 and 557 of the APA be applied. This Court has held in the *Florida East Coast Railway* case 410 US 224 that the various protections of the Administrative Procedure Act are separable, and consequently need not all be applied to the agency conduct in a cumulative manner. Since the language of Section 554 is in the disjunctive, it can readily be applied without requiring the application of the provisions of Section 556 which require an administrative law judge to be utilized as the hearing officer. The decision of the Seventh Circuit is in harmony with this conclusion. Thus, an affirmance by this Court of the decision of the Seventh Circuit, would not necessarily result in the requirement that an administrative law judge be assigned to 10(k) hearings.

The Board's argument, that its interpretation of the applicability of the Administrative Procedure Act, to its Section 10(k) hearings is entitled to great weight, is without merit. The same argument was made to this Court in the *CBS* 364 U.S. 573 case, but was found to be without persuasive effect because of the Labor Board's failure to proceed as required by law.

The arguments advanced for the expeditious handling of jurisdictional disputes is not impeded by the finding of the Seventh Circuit. To the contrary, the application

of the injunctive relief under Section 10(l) of the LMRA have been applied to the instant case, prior to the 10(k) hearing and the subsequent unfair labor practice hearing. As a practical matter, the Labor Board will suffer no harm by following the decision of the Seventh Circuit, which prevents the assignment of the dual functions to the same employee. Such separation will serve to avoid the untenable situation, as in the instant case, where one individual serves as prosecutor in an unfair labor practice hearing, after having shaped the record, on which the Board made its jurisdictional dispute determination, by means of his previous rulings on admissibility of evidence. The rulings on evidence rather than being inconsequential, presented a substantial issue to the Seventh Circuit, concerning a conflict with a decision of the Sixth Circuit Court of Appeals, in the case of *NLRB* v. *Dayton Motels*, 474 F2d 328 on the question of consideration of relevant evidence.

ARGUMENT

I.

THE CLEAR STATUTORY LANGUAGE OF THE ADMINISTRATIVE PROCEDURE ACT §554 SHOULD BE ENFORCED AS IT IS WRITTEN.

A review of the Administrative Procedure Act in its pertinent sections, leads to the conclusion that the Seventh Circuit Court of Appeals was correct in its determination that the Labor Board violated the prohibition against the commingling of functions. Further, an analysis of the language of the various sections of the APA, here pertinent, must necessarily result in the conclusion that the hearing conducted by the Labor Board into the jurisdictional dispute under Section 10K of the statute is an adjudication within the meaning of the APA.

There is no doubt that the APA, in Section 554, titled *Adjudication*, prohibits the commingling of the prosecutorial and adjudicative functions in the same person. Section 554 begins in paragraph A with the following language:

> "(A) This section applies according to the provisions hereof in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing. . . ."

Paragraph (A) then goes on to list six exceptions to its applicability, which do not include the jurisdictional dispute hearing under Section 10K,[2] but which to include the Labor Board's certification of worker representatives,

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[2] This Court has long held that an exemption from the terms of the APA should not be presumed. *Marcello* v. *Bonds*, 349 US 302 at p. 310.

provided for in §9 of the LMRA. Specifically, in subsection (D) the language of Section 554 reads:

> "An *employee or agent engaged* in the performance of investigative or *prosecuting functions* for an agency in a case *may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review* pursuant to Section 557 of this Title, except as witness or counsel in public proceedings. . . .

Thereafter this paragraph lists specific named exceptions, which again do not include the 10K hearing.

In the construction of statutory language, this Court has applied the basic principle that clear language, which contains the Congressional meaning in direct terms should be interpreted accordingly. *United States* v. *American Trucking Associations,* 310 U.S. 534. On that point this Court said as follows:

> "* * * There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning.* * *" 310 U.S. 534 at 543 (citations omitted)

Earlier this Court said that the clear language of a statute resulted in an even more restrictive area of discretion in the Court. *Helvering* v. *City Bank Farmer's Trust Co.,* 296 U.S. 85. This Court said, concerning its need to look to the Congressional record as an aid for statutory construction, as follows:

> "* * * We are not at liberty to construe language so plain as to need no construction, or to refer to committee reports where there can be no doubt of the meaning of the words used. * * *" 296 US 85 at page 89 (footnote omitted).

Although the language of the *Helvering* case, supra., may have been somewhat modified by the passage of time, particularly in the area of interpretation and application of statutory language in the field of labor relations, the basic principle concerning clear statutory language has remained. The additional factor which this Court has looked to, is the ascertainment of the general purposes to which the Congress was seeking to address itself in the passage of the legislation. This was clearly stated by Mr. Justice Frankfurter in the case of *Local 1976, United Brotherhood of Carpenters* v. ***NLRB,*** 357 U.S. 93 as follows:

> "* * * The problem raised by these cases afford a striking illustration of the importance of the truism that it is the business of Congress to declare policy and not this Court's. The judicial function is confined to applying what Congress has enacted after ascertaining what it is that Congress has enacted. But such ascertainment, that is, construing legislation, is nothing like a mechanical endeavor. It could not be accomplished by the subtlest of modern 'brain' machines. Because of the infirmities of language and the limited scope of science in legislative drafting, inevitably there enters into the construction of statutes the play of judicial judgment within the limits of the relevant legislative materials. Most relevant of course is the very language in which Congress has expressed its policy and from which the Court must extract the meaning most appropriate. * * *" 357 U.S. 93 at 100.

This Court has long held that where the statute is clear and unambiguous in its language, it should be given the meaning that is explicit in the words used by Congress. Local 134 submits that the wording of Section 554 of the APA is an example of such clear language, which

requires only a direct application to prohibit any commingling of functions. This is what the Seventh Circuit did in its finding of such a violation by the Labor Board conduct in assigning the same attorney to the function of hearing officer in the 10(k) hearing and later as the counsel for General Counsel in the unfair labor practice hearing. That the clear language of § 554(d) speaks against the commingling of functions has not been seriously questioned since this Court so ruled in the case of *Wong Yang Sung* v. *McGrath*, 339 U.S. 33. In that case the meaning of the language was stated as follows:

> "More fundamental, however, was the purpose to curtail and change the practice of embodying in one person or agency the duties of prosecutor and judge. * * *" *Wong Yang Sung* v. *McGrath*, 339 U.S. 33 at page 41.

The Seventh Circuit applied the § 554 language in its holding that the Labor Board had violated this clear prohibition. (Main A. 68-70).

II.

THE JURISDICTIONAL DISPUTE HEARING OF THE LABOR BOARD, WHICH IS HELD UNDER SECTION 10K OF THE LMRA, IS AN ADJUDICATION WITHIN THE MEANING OF THE APA.

A. Sections 551, Definitions, and 554, Adjudications, encompass the §10K hearing of the Labor Board.

ITT, CWA, and the Labor Board apparently concede that § 554 does prohibit the commingling of functions where the administrative agency hearings are an adjudication within the meaning of the introductory language of that Section of the APA. They contend primarily, that the Labor Board's 10K hearing is not an adjudication within the meaning of that statute.

Thus the aplication of the prohibition contained in § 554, to the instant case, turns on whether the jurisdictional hearing in question is an adjudication. The APA in Section 551, titled *Definitions,* sets out the criteria for what constitutes an adjudication, in its subsection (7), which reads as follows:

> "Adjudication" means agency process for the formulation of an order."[2a]

It is undisputed that the jurisdictional dispute determination, issued by the Labor Board, becomes a part of its order issued following the unfair labor practice hearing. The Board's own rules and regulations in Section 102.9, provide that the record and exhibits at the 10K hearing become a part of the unfair labor practice hearing. This procedure was specifically recognized and followed at the unfair labor practice hearing in the instant case. (Main A. 77) Thus, the Labor Board's 10K hearing and the decision which eminates from that hearing, necessarily are part of that agency's process for the formulation of the Labor Board's subsequent unfair labor practice order.

As defined in the APA, Section 551(6): "order means the whole *or a part* of a final disposition, whether affirmative, negative, injunctive or declaratory in form, of an agency in a manner other than rule making but including licensing." [3] (emphasis added) The definition of order, therefore, includes either the entire final disposition or a part of the final disposition. Clearly the jurisdictional determination by the Labor Board is a part of its final

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[2a] This Court has recently noted, with approval, this language in the majority opinion in NLRB v. Bell Aerospace, 94 Sup. Ct. 1757 at p. 1770 fn 21.

[3] Cited with approval in NLRB v. Bell Aerospace, supra.

disposition which results in its unfair labor practice decision. The Labor Board's own Rules set out the procedure which requires the bifurcated hearing. Thus, as this Court noted in its decision of *NLRB* v. *Plasterers Local No. 79*, 404 U.S. 116, the 10K hearing is a necessary first step to the Labor Board's unfair labor practice hearing under Section 8(b)(4)(D). The Court said:

> "* * * When a section 8(b)(4)(D) charge is filed and there is reasonable cause to believe that an unfair labor practice has been committed, issuance of the complaint is withheld until the provisions of Section 10K have been satisfied. That section directs the Board to 'hear and determine' the dispute out of which the alleged unfair labor practice arose: the Board is required to decide which union or group of employees is entitled to the disputed work in accordance with the acceptable, Board-developed standards, unless the parties to the underlying suit settle the case or agree upon a method for settlement. Whether the Section 8(b)(4)(D) charge will be sustained or dismissed is thus dependent upon the outcome of the 10K proceeding. * * *" (404 U.S. 116 at pages 122 and 123)

Clearly the 10K hearing falls within the § 551(7) definitions of adjudication as being a necessary part of the agency process for the formulation of an order, because it is a part of the order which is the Labor Board's final disposition of the matter. It is submitted that the definitions of adjudication and order in § 551 of the APA, when read together, unnecessarily result in the conclusion that Section 554 of that Act is applicable to the jurisdictional dispute hearing under Section 10K.

B. This Court's Wyman-Gordon decision has rendered an even broader application of the APA's adjudication definition to Labor Board hearings.

This clear and unambiguous language of Section 551 has resulted in an absence of judicial interpretations of the meaning of its language. Obviously the Courts have had little difficulty in applying the literal terms of the definitions to the cases before them. However, there appears one decision, by this Court, which although not directly concerned with the interpretation of the APA, sets out the criteria for the type of Labor Board hearing which will be within the definition of adjudication. In *NLRB v. Wyman-Gordon Company*, 394 U.S. 759, this Court decided that the Labor Board could require an employer to submit the names and addresses of its employees who were eligible to vote in a representation election. The Labor Board had issued its decision requiring such action by the employer, in subsequent election cases, in its decision known as *Excelsior Underwear Inc.*, 156 NLRB 1236. This principal, which became known as Excelsior Rule was not promulgated in accordance with the requirements of Section 553 of the APA. This Court, through Mr. Justice Fortas decided that the Board had acted properly, even though it had not followed the rule-making requirements of the Act. The prevailing opinion by Mr. Justice Fortas, in which then Chief Justice Warren, Mr. Justice Stewart and Mr. Justice White joined, did not exhaustively analyze the question of adjudication.

However, in the specially concurring opinion by Mr. Justice Black, with whom Mr. Justice Brennen and Mr. Justice Marshall joined, a clear discussion of the meaning of adjudication under the provisions of Section 551 was

set forth.[4] After setting forth, by quotation, the definitions of adjudication and order, contained in # 6 and 7 of Section 551, and noting the distinction between rule making and adjudication, Mr. Justice Black said as follows:

> "In the present case there is no dispute that all the procedural safeguards required for 'adjudication' were fully satisfied in connection with the Board's *Excelsior* decision, and it seems plain to me that that decision did constitute 'adjudication' within the meaning of the Administrative Procedure Act, even though the requirement was to be prospectively applied. See Great Northern R. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 53 S.Ct. 145, 77 L.Ed. 360 (1932). The Board did not abstractly decide out of the blue to announce a brand new rule of law to govern labor activities in the future, but rather established the procedure as a direct consequence of the proper exercise of its adjudicatory powers. Sections 9(c) (1) and (2) of the Labor Relations Act empower the Board to conduct investigations, hold hearings, and supervise elections to determine the exclusive bargaining representative that the employees wish to represent them. This is a key provision of the plan Congress adopted to settle labor quarrels that might interrupt the free flow of commerce. A controversy arose between the Excelsior Company and its employees as to the bargaining agent the employees desired to act for them. The Board's power to provide the procedures for the election was invoked, an election was held, and the losing unions sought to have that election set aside. *Undoubtedly the Board proceeding for determination of whether to confirm or set aside that election was 'agency process for the formulation of an order'* and thus *was 'adjudication' within the meaning of the Administrative Procedure Act.*

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[4] The dissents by Mr. Justice Douglas and Mr. Justice Harlan did not not disagree with the analysis and conclusions of Mr. Justice Black.

> "The prevailing opinion seems to hold that the *Excelsior* requirement cannot be considered the result of adjudication because the Board did not apply it to the parties in the *Excelsior* case itself, but rather announced that it would be applied only to elections called 30 days after the date of the *Excelsior* decision. But the *Excelsior order was nonetheless an inseparable part of the adjudicatory process.*" (emphasis supplied) (394 U.S. 759 pages 172 and 173).

Thus, even in the case of a representation hearing, under Section 9 of the LMRA, which is specifically exempted from the coverage of §554, Mr. Justice Black found that the Board proceedings met the requirements of Section 551 (6) and (7), because it was part of the agency's process for the formulation of an order. Therefore, the 10K hearing must be considered as an adjudication within the general definition set forth in APA §551.

C. The decision of the Court of Appeals for the District of Columbia is erroneous because it is contrary to the Wyman-Gordon decision.

The arguments advanced by ITT, CWA and the Labor Board for the proposition that the Section 10(k) hearing is not an adjudication, rely primarily on the authority of a decision by the Court of Appeals for the District of Columbia known as *Bricklayers, Masons, and Plasterers International Union of America* v. *NLRB*, 475 F. 2d 1316. However that decision cannot serve as valid authority for such a proposition because it is directly contrary to the finding of this Court in the *Wyman-Gordon* case, Supra. The rationale of the Court of Appeals, for its conclusion that the Section 10(k) hearing is not an adjudication, rests basically on the Court's analogizing the 10(k) hearing to the representation case hearings held under Section 9 of the Labor Management Relations Act. Initially, it

should be noted that the analogy has as a fatal defect the fact that the Section 10(k) hearings are authorized by Section 10 of the LMRA, while the representation hearings are authorized by Section 9 of that statute.

But even if the analogy were to be considered as valid, the language of Mr. Justice Black, quoted above, shows that this Court has found representation hearings themselves, to be within the definition of adjudication as set out in Section 551 of the APA. Therefore the conclusion by the Court of Appeals for the District of Columbia in the *Bricklayers* case, supra, is obviously contrary to the decision of this Court in *Wyman—Gordon,* and cannot serve as valid authority to overturn the Seventh Circuit decision in the instant case.

D. The 10K Hearing is a determination that is required to be made on the record within the meaning of the APA's §554.

The Labor Board presents the untenable argument in its Brief, Section I B, that the 10(k) hearing is not a determination which is required by statute to be made on the record after opportunity for an agency hearing. Such a contention is exactly contrary to the clear wording of Section 10(k) of the LMRA and this Court's statement as to the meaning of that language.

The use of the term adjudication in §554(a) is grammatically part of the introductory sentence which states as follows: "* * * in every case of adjudication required by statute to be determined on the record after opportunity for agency hearing * * *." The provisions of Section 10K of the LMRA specifically requires that the hearing be held on the jurisdictional dispute question. Thus Section 10K of the statutes reads as follows:

> "Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of Section 8(b), the Board is *empowered and directed to hear and determine* the dispute out of which such unfair labor practice shall have arisen, ..." (emphasis supplied)

Therefore Congress has specifically required by statute, that the matter be determined on the record for all of those cases concerning a jurisdictional dispute. Again a literal application of the language of the LMRA is sufficient to meet the requirement of adjudication, under §554 of the APA.

This Court commented specifically upon the meaning of the language of Section 10(k) in its landmark decision of *NLRB* v. *Radio and Television Broadcast Engineers Union Local 1212 IBEW*, 364 U.S. 573. In this regard the Court stated what the language of Section 10(k) meant as follows:

> "The language of §10(k) supplementing §8(b)(4)(D) as it does, sets up a method adopted by Congress to try to get jurisdictional disputes settled. The words 'hear and determine the dispute' convey not only the *idea of a hearing* but also the idea of deciding a controversy. * * *" 364 U.S. 573, 579 (emphasis added)

The Labor Board error is based on its failure to distinguish between the adjudicatory process of its 10(k) hearing and the rule making process of administrative agencies, as exemplified by the ICC's freight car procedure, which was the subject of this Court's decision in the case of *U. S.* v. *Florida East Coast Railway Company*, 410 U.S. 224.

Local 134 submits that this Court's clear language cited above is a clear and unequivocal interpretation of the words of §10(k) which do require that the determination be made on the record.

Further, in his exhaustive and authoritative work, titled Administrative Law Treatise, Professor K. C. Davis specifically discussed this question as follows:

> "§ 13.08. Adjudications "Required by Statute to Be Determined on the Record after Opportunity for Agency Hearing"
>
> All of Section 5 is limited to adjudications 'required by statute to be determined on the record after opportunity for an agency hearing.' This limitation has been especially troublesome.
>
> One difficulty lies in finding what is 'required by statute.' If a statute is silent with respect to hearings and if a court holds that Congress must have intended that a hearing be held, does the statute require a hearing? If so, what if the statute is silent concerning hearings and the court instead of creating law in the name of statutory interpretation creates law in the name of the Constitution and holds that a hearing is required? Does the statute then require a hearing? If not, should the application of Section 5 depend upon the form of words the court, without this problem in mind, happened to use in writing its opinion?
>
> Similarly, if a statute requires a hearing but says nothing about requiring the determination to be made on the record, a court may interpret the requirement of a hearing as a requirement of the kind of hearing that includes a determination on the record; if this interpretation is given, does the statute require a determination on the record? If so, should the opposite answer be given when the court says nothing about statutory interpretation but holds that due process requires the determination to be made on the record?" (at pages 223 and 224)

* * *

After citing some examples, Davis, cites this Court's decision in the case of *Wong Yang Sung* v. *McGrath*, 339 U.S.

33, as being dispositive of the question. He said as follows:

> "The basic problem came to the Supreme Court in Wong Yang Sung v. McGrath. An alien ordered deported sought habeas corpus on the ground that Section 5(c) of the APA had been violated by the Immigration Service, and the question was whether a deportation proceeding is 'required by statute to be determined on the record after opportunity for an agency hearing,' within the meaning of the introductory clause of Section 5. The Immigration Act provided merely that 'any alien . . . found in the United States in violation of this Act . . . shall, upon the warrant of the Attorney General, be taken into custody and deported.' The Act said nothing either of hearing or of determination on the record. The Government argued that Section 5 of the APA in the original bill applied to hearings required 'by law,' that the Attorney General had suggested that it be changed to 'required by statute or Constitution,' that it finally emerged 'required by statute,' and that therefore the provision should apply only when explicit statutory words confer the right to hearing and to a determination on the record. But the Court dismissed the arguments of both parties resting on legislative history, with the remark: 'The legislative history is more conflicting than the text is ambiguous.'
>
> "The Court was interested, not in the relative superficialities of legislative history, and not in a mere analysis of the words that the draftsmen had happened to use in trying to express the will of Congress, but in the fundamental objectives of the legislation and in producing a result that would best achieve those objectives. For this reason the Court surveyed the whole history of the development of the APA, beginning in 1929 with the introduction by Senator Norris of a bill to create a separate administrative court. The Court spoke of efforts to improve state administra-

tive practices, of the 1937 Committee on Administrative Management, of the Attorney General's Committee on Administrative Procedure, of the Walter-Logan bill and the President's veto message, and finally of the evolution of the McCarran-Sumners bill which became the APA. From this survey the Court concluded that 'it would be a disservice to our form of government and to the administrative process itself if the courts should fail, so far as the terms of the Act warrant, to give effect to its remedial purposes where the evils it was aimed at appear.'

"The Court then emphasized that the two principal purposes of the APA were to introduce greater uniformity of procedure and 'to curtail and change the practice of embodying in one person or agency the duties of prosecutor and judge.' This statement the Court fully supported with its historical survey of the movement that became the APA. It concluded that the Court's plain duty was 'to construe this remedial legislation to eliminate so far as its text permits the practices it condemns.'" (at pages 227 and 228.) (footnotes omitted)

Finally, Davis shows that the *Wong* case rationale has been applied by this Court in subsequent cases, by the following language.

"That the Court meant what it said in the Wong case is shown by the Riss case of the following year. The ICC denied a certificate of convenience and necessity to a motor carrier, without complying with § 5 of the APA. The district court held that the statute authorizing certificates did not require a hearing. Much to the consternation of the ICC bar, the Supreme Court reversed per curiam, with a mere citation of the Wong case. When the Seventh Circuit held that § 5 did not apply to a fraud order proceeding in the Post Office Department, the Solicitor General confessed error and the Supreme Court reversed per curiam. Another court has later applied § 5 to a Post Office

> order stopping delivery of mail on grounds of obscenity." (footnotes omitted) at page 229.

The decisions cited by Professor Davis, including the *Wong* case supra and the *Riss* case, supra are the exact precedent relied upon by the Court of Appeals for the Seventh Circuit as the foundation for its decision (Main A. 68). It is clear that the 10K hearing meets the requirement of adjudication under the APA, whether the question be viewed from the definition as contained in §551 or the specific reference to §554(a). Thus, since the 10K hearing meets the criteria of an adjudication, the Seventh Circuit's conclusion that the APA was violated, must necessarily follow. It is submitted by Local 134, that the Court below was correct when it concluded as follows:

> "* * * This commingling of functions is plainly inconsistent with both the spirit and the letter of the Act, and, we think, incompatible with the accepted norms for the proper administration of justice. An order of the Board thus tainted should not be enforced." (Main A. 71)

III.

THE DETERMINATION THAT THE 10K HEARING IS AN ADJUDICATION UNDER THE APA MUST BE DISTINGUISHED FROM THE RIGHT TO JUDICIAL REVIEW OF THE LABOR BOARD'S DECISION.

A. Sources of the right to Judicial Review of administrative agency decisions

Additional reasons advanced by ITT, CWA and the Labor Board for the reversal of the decision by the Seventh Circuit, are the alleged practical problems which would arise from the affirmance of that decision. They argue that the 7th Circuit's decision, which holds that the 10K hearing is an adjudication under the APA, would

necessarily result in the conclusion that the 10K decision is an appealable order subject to immediate review by the Court of Appeals. This conclusion, which is unsubstantiated by any citation of authority, is erroneous and results from a failure to analyze the judicial review provisions of both the APA and the LMRA.

As was noted in Section II of the argument set out above, the provisions governing administrative agencies in the handling of their immediate functions, is set forth in 5 U.S.C. 551 through 559. However, that statute also contains the provisions for judicial review of administrative agencies actions in 5 U.S.C. §701 through 706. These provisions for judicial review are general in nature, and by their terms are not applicable to those instances where Congress has specifically set out a specific judicial review provision. Thus in Section 703, titled Form and Venue of Proceedings, the APA reads as follows:

> "The form of proceeding for judicial review is the special statutory review proceedings relevant to the subject matter *in a court specified by statute.* * * *"

Again we have clear and unequivocal language which states that it is the intent of Congress that the appeal route to be followed, is that contained in the statute creating the administrative agency. This principle has been followed by the Fifth Circuit Court of Appeals in the case of *United States* v. *Southern Railway Company*, 364 F. 2d 86. There the Court said as follows:

> "* * * A long line of Supreme Court cases establishes the principle that where Congress has provided administrative and judicial review procedures which are designed to permit agency expertise to be brought to bear upon particular problems, the prescribed pro-

> cedures are exclusive, and this is true even though Congress may not have expressly provided for the exclusiveness of the statutory procedure. Whitney Bank v. New Orleans Bank, 379 U.S. 411, 85 S.Ct. 551, 13 L.Ed.2d 386 (1965). * * *" 364 F.2d 86 at p. 91.

The language of this Court in the case cited in the Fifth Circuit decision is as follows:

> "* * * That Congress has not expressly provided that the statutory procedure is to be exclusive does not require a different conclusion. For Congress has expressly rejected proposed provisions for review in these cases in the district courts. Moreover it has enacted a specific statutory scheme for obtaining review, and where Congress has directed such a procedure as that found in the Bank Holding Company Act of 1956, the doctrine of exhaustion of administrative remedies comes into play and requires that the statutory mode of review be adhered to notwithstanding the absence of an express statutory command of exclusiveness. * * *" Whitney National Bank v. Bank of New Orleans and P.R. Co., 379 U.S. 411 at page 422.

Finally the Fifth Circuit has reaffirmed the principle set out above in the *Southern Railway* and *Whitney* cases in a more recent decision in the case of *Coca-Cola Company* v. *F.T.C.*, 475 F. 2d 299. In that case the Circuit Court quoted from this Court's *Whitney* decision as follows:

> "* * * The Federal Trade Commission Act, 15 U.S.C. § 41 et seq., contemplates judicial review only of 'an order of the Commission to cease and desist,' 15 U.S.C. § 45 (c), and then only 'in the court of appeals of the United States.' *Id.* This scheme is fully consonant with the Administrative Procedure Act, 5 U.S.C. § 551 et seq. The Supreme Court has said, moreover, that where Congress 'has enacted a specific statutory

> scheme for obtaining review, . . . the doctrine of exhaustion of administrative remedies . . . requires that the statutory mode of review be adhered to notwithstanding the absence of an express statutory command of exclusiveness.' Whitney Nat'l Bank v. Bank of New Orleans 379 U.S. 411, 422, 85 S.Ct. 551, 558, 13 L.Ed.2d 386 (1965). * * *" Coca-Cola Company v. F.T.C., 475 F.2d 299 at 302.

The above cases make it clear that the principle set forth in Section 703 of the APA should be followed where the statute, such as the LMRA has specifically set forth the method by which judicial review may be obtained.

It is undisputed that the LMRA has specifically contained therein the congressionally intended method by which review can be obtained. In Section 10 of that Act, 29 U.S.C. §160, there is provided, in two separate sections, methods of judicial review. Initially under subsection (e) the Board is given the right to seek enforcement of its orders in the United States Court of Appeals. That Section says as follows:

> "* * * (e) The Board shall have power to petition any Court of Appeals of the United States . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, * * *"

In addition §10(f) of that statute sets forth an equivalent right to review in parties who have been aggrieved by a Board order. The language of that subsection is as follows:

> "(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in

> any United States Court of Appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business. * * *"

The provisions of subsection (f) specifically use the term "final order of the Board", as the prerequisite for any aggrieved party to seek judicial review. Therefore the question of what constitutes the final order of the Board is the determinant of when judicial review is available to a party who has appeared before that administrative agency.

B. Labor Board rule concerning Judicial Review

Since Section 10(f) of the LMRA does not specifically set forth the meaning or difinition of final order, the Congressional intent has been that the Labor Board should be free to ascertain for itself when the 10K hearing is subject to judicial review.[5] The Labor Board has done this in its Rules and Regulations under Section 102.92 where the Board said as follows:

> "Section 102.92 Review of Determination—The record of the proceedings under Section 10(k) and the determination of the Board thereon shall become a part of the record in such unfair labor practice proceedings and shall be subject to judicial review, insofar as it is in issue, in proceedings to enforce or review the final order of the Board under Section 10(e) and (f) of the Act."

Thus the Labor Board has prescribed by its own internal rules, the method by which the jurisdictional dispute under Section 10(k) may become a part of the combined final order which is subject to review under 10(e) and (f).

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[5] The LMRA provides that the Labor Board should fashion its own rules in comformity with the provisions of the APA. (see 29 USC § 156)

It is clear that this prescribed method for review must be followed by any party appearing before the Board, such as Local 134, under the principle of exhaustion of administrative remedy. This Court has clearly required the exhaustion of administrative procedural requirements under the general theory of the exhaustion of administrative remedies.

C. Exhaustion of Administrative Remedy

In discussing that doctrine in the case of *McKart* v. *United States*, 395 U.S. 185, this Court said, through Mr. Justice Marshall, as follows:

* * *

"The doctrine of exhaustion of administrative remedies is well established in the jurisprudence of administrative law. See generally 3 K. Davis, Administrative Law Treatise § 20.01 *et seq.* (1958 ed., 1965 Supp.); L. Jaffe, Judical Control of Administrative Action 424-458 (1965). The doctrine provides 'that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.' Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51, 58 S.Ct. 459, 463, 82 L.Ed. 638 (1938).

* * *

"Perhaps the most common application of the exhaustion doctrine is in cases where the relevant statute provides that certain administrative procedures shall be exclusive. See Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 58 S.Ct. 459, 82 L.Ed. 638 (1938) (National Labor Relations Act). The reasons for making such procedures exclusive, and for the judicial application of the exhaustion doctrine in cases where the statutory requirement of exclusivity is not so explicit, are not difficult to understand. A primary purpose is, of course, the avoidance of premature interruption of the administrative process." 395 U.S. 185 at 193

This Court has applied the principle of exhaustion of administrative remedies to matters before the Labor Board in cases more recent than *Myers* v. *Bethlehem Shipbuilding*, See *NLRB* v. *Industrial Union of Marine and Shipworkers*, 391 U.S. 418 at page 426.

Those cases where this Court has seen fit to grant judicial review contrary to the rules prescribed by the Labor Board has been in cases where the Board has specifically violated a prohibition of the Act, or exceeded the authority which Congress has granted it. Thus, in *Leedom* v. *Kyne*, 358 U.S. 184, an exception was granted to the exhaustion of administrative remedies principle. In explaining the limited area of this exception, this Court later stated in *McCulloch* v. *Sociedad National de Marineros de Honduras*, 372 U.S., 10 as follows:

> "* * * Having examined the question of whether the District Court had jurisdiction at the instance of Sociedad to enjoin the Board's order, we hold that the action filed in the limited exception fashioned in *Leedom* v. *Kyne*, 358 U.S. 184, 79 S. Ct. 180, 3 L.Ed. 2d 210 (1958). In that case judicial intervention was permitted since the Board's order was 'in excess of its delegated powers and contrary to a specific prohibition of the act.'" 372 U.S. 10 at page 16

Clearly the Labor Board's having set forth in its rules the fact that the 10(k) hearing would become a part of, and be absorbed into, the unfair labor practice hearing, was not in excess of its delegated powers, nor was it contrary to the specific prohibition of the Act and thus is outside the *Leedom* v. *Kyne* exception. Since this internal rule of Labor Board procedure which proscribes the route to judicial review, is not clearly contrary to Congressional intent, it must be followed.

The Third Circuit Court of Appeals had occasion to pass upon the relationship between the judicial review provisions of the APA and those of the LMRA. *Leeds and Northrup Company* v. *NLRB*, 357 F. 2d 527. Therein, speaking upon the availability of judicial review under Section 10(f) of the statute that Court said as follows:

* * *

"On the record before us we must disagree with the contentions of respondent. Jurisdiction of this petition obtains under Section 10(f) of the National Labor Relations Act, as amended (49 Stat. 449 29 U.S.C. 160(f), and Section 10(e) of the Administrative Procedure Act (60 Stat. 237, 5 U.S.C. 1009 (e)).

* * *

To propose that United States Courts of Appeal are powerless, in a jurisdictional sense, to review quasi-judicial administrative action, *either because rules* and *regulations* or *policy, do not provide* an *adequate avenue of review* up to the door of the court, or because of the absence of precise Congressional articulation for such review, poses inadequacy and injustice which Congress would never intend. It is *in such circumstances* that the *Administrative Procedure Act, 5 U.S.C. 1001, et seq., 1009, makes its greatest contribution.* The complex of administrative government designed by Congress was intended to promote expertise in particular areas of extensive activity, as well as unburden the judiciary. However, such design and intention does not confer upon a governmental agency the power to foreclose judicial review. To hold otherwise would do violence to fundamental constitutional concepts of government and sow the seeds of oligarchy in the administrative level of government, thus placing it beyond the reach of the judiciary as a reviewing authority, where contemplated by statutory design, as here. * * *" 357 F.2d 527 at pp. 531 and 532 (footnote omitted)

Thus, the Third Circuit has held that the review provisions of the APA are intended to apply only when there is no adequate method of judicial review provided by Congress in the statute, or by the agency in its internal rules. Local 134 submits that this analysis by the Third Circuit correctly states the relationship between the judicial review provisions of the APA and the LRMA. Further it is implicit in the language of that Court that the congressional intent, as seen by the relationship between these two statutes, is that the Labor Board has been granted the authority to prescribe its own internal rules as to the appropriate time for judicial review by the designation of what is a final order, or by some other final conduct which makes judicial review appropriate. In the area of the 10(k) jurisdictional dispute hearing, the Board, by its own rules has adopted its internal procedure, whereby the 10(k) hearing is absorbed into the unfair labor practice decision. That combination of jurisdictional dispute determination and unfair labor practice decision comprises the final order which is reviewable under Section 10(f) of the LMRA.

Local 134 has followed the Labor Board rules in the instant case and petitioned for review, by the Seventh Circuit only after the combined 10(k) hearing determination and unfair labor practice decision's was issued as the final order. Thus Local 134 has exhausted the administrative remedies set out by the Labor Board, in harmony with the provisions of the APA, for the judicial review of its final order.

More importantly to the instant case, the argument advanced, that any finding by this Court to the effect that the 10(k) jurisdictional determination is an adjudication under the APA, would necessarily make available the right

of independent judicial review, is an erroneous argument. Local 134 submits that the argument based upon the alleged basis of interference with agency process by premature judicial review, is improper and should be disregarded by this Court.

IV.

THE DECISION OF THE SEVENTH CIRCUIT DOES NOT REQUIRE THE LABOR BOARD TO ASSIGN AN ADMINISTRATIVE LAW JUDGE TO 10K HEARINGS.

ITT, CWA and the Labor Board contend that the decision of the Seventh Circuit will have a detrimental effect on future Labor Board jurisdictional dispute hearings because it will require the Labor Board to assign an Administrative Law Judge to the hearings held under Section 10K. This contention is erroneous because, as noted above in III of the argument, the determination that a 10K hearing is an adjudication within the meaning of the introductory language of §554 of the APA, does not necessarily mean that it is a final order of the Labor Board.

Further, the language in the second paragraph of § 554(d), is such that it does not require the Labor Board to assign an Administrative Law Judge to hearings under Section 10K. That language, which prohibits the commingling of functions, is phrased in the disjunctive when it speaks of the type of agency conduct to which the prohibition applies. Thus in pertinent part the language reads:

> "* * * may not, in that or a factually related case, participate or advise in the *decision*, recommended decision, *or* agency review pursuant to Section 557 of this Title * * *" (emphasis supplied).

This clear statutory language, which uses the word "or," in front of the words "agency review pursuant to Section 557," differentiates that type of agency conduct from the type of conduct which results in a decision. Thus, while the prohibition applies to the 10K hearing, which results in a Decision and Determination of Dispute, that decision need not bring into play the second part of the disjunctive, which pertains to agency review pursuant to Section 557. If Section 557 were to necessarily be applied to the 10k hearing, then the Labor Board could be required to assign an Administrative Law Judge to hear that matter.

Subsection (c) and the first paragraph in (d) of § 554, specifically refer to Section 556 and 557 in interrelationship to the type of decisions involved. However, the second paragraph of (d) which includes the prohibition against commingling, does not refer to Section 556 and refers only to agency process under Section 557 in the disjunctive. Thus, the 10K hearing, which is required to be held under the provisions of § 554, need not he held under the additional requirements of § 556 and 557 of the APA.

This Court has had occasion to pass upon the question of whether these various sections of the APA need be applied as an interrelated single entity or whether, to the contrary, one section may stand on its own. *United States* v. *Florida East Coast Railway Company*, 410 U.S. 224, 83 S.Ct. 810. That case concerned the rule-making provisions of Section 553 of the APA and the relationship to Sections 556 and 557. This Court speaking through Mr. Justice Rehnquist stated as follows:

> " * * *
>
> Following our decision last Term in United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 92

S.Ct. 1941, 32 L.Ed.2d 453 (1972), we noted probable jurisdiction, 407 U.S. 908, 92 S.Ct. 2431, 32 L.Ed.2d 682 (1972), and requested the parties to brief the question of whether the Commission's proceeding was governed by 5 U.S.C. § 553 or by 556 and 557 of the Administrative Procedure Act. *We here decide that the Commission's proceeding was governed only by §553 of that Act*, and that appellees received the 'hearing' required by § 1(14)(a) of the Interstate Commerce Act. We therefore reverse the judgment of the District Court and remand the case to that court for further consideration of appellees' other contentions that were raised there but which we do not decide.

* * *

U.S. v. Florida East Coast R.R. Co., 93 Sup. Ct. 810 at pages 812, 813, and 814. (emphasis supplied and footnotes omitted)

It is submitted by Local 134 that the rationale expressed above, for the separation of Section 553 from the unnecessary application of Section 556 and 557, applies equally to the ability of Section 554 to stand on its own. If anything, Section 554 is able to stand on its own more effectively than Section 553, because of the use of the disjunctive in the relevant parts of Section (b). In addition, it is significant that the adjudications covered by § 554 may be either the whole or a part of the agency's final order. (See Part II of Argument supra)

The Labor Board by its rules has chosen to establish the 10(k) hearing as constituting only a part of its two step decision procedure which results in the agency's final order. Clearly the provisions of Section 556 and 557 of the APA are applicable to the subsequent unfair labor practice hearing, and thus the parties are afforded the protection of those sections of that statute.

Given the distinction made by this Court as to the separability of the clauses of the APA, the question arises as to whether that distinction was made by the Seventh Circuit or whether it can be made by this Court in light of the Seventh Circuit's decision. Local 134 submits that this Court may make such a distinction without negating the essential rationale of the Seventh Circuit. That Court's decision is based upon the violation of Section 554 as interpreted by the *Wong* case and the *Riss* case, supra. (Main A. 68) The Seventh Circuit found that the essence of the violation by the Labor Board was the ability of the hearing officer at the 10(k) hearing to shape the record which the Board subsequently relied upon to make its decision. This factor, coupled with the psychological problems presented by the possibility of serving as the advocate in the subsequent hearing, were the elements which the Seventh Circuit found to violate the separation of functions prohibition as set out in the *Wong* case.[6] The decision of the Seventh Circuit which was in favor of removing the potential for such psychological dilemmas by the application of the safeguards of the *Wong* decision is both psychologically and judicially sound. Given the choice between the two alternate speculations on the mental machinations of the Labor Board's employee, that Court chose to decide in favor of that course which would protect the rights guaranteed in §

[6] It is argued that the psychological factor did not exist because the individual could not know, when he was the hearing officer, that he would be assigned as the prosecutor in the subsequent case. It is submitted by Local 134 that the contention that the individual did not at least speculate on this possibility, presents a psychological assumption that is not only unwarranted but also contrary to human nature. He may also have been aware that his employment by Illinois Bell Telephone Company was to begin shortly thereafter.

554 of the APA. However this finding does not turn upon the question of whether the hearing officer must be an administrative law judge pursuant to the requirements of Sections 554 and 557.

Although Local 134 did present as one of its arguments to the Seventh Circuit, the failure by the Labor Board to assign an administrative law judge to the 10K hearing, that Court did not directly decide this question. The Court did refer to the provisions of Section 556, to illustrate the congressional intent that the administrative officers who presides at such hearing be completely isolated, impartial and independent. (Main A. 70) However the reference to the conditions that relate to administrative law judges, did not result in that Court's finding that an Administrative Law Judge must necessarily hear all 10K matters. Rather, that Court assumed in its decision that the protections of Section 556 were afforded in the instant case. (Main A. 70, fn. 3) Significantly the Seventh Circuit did not refer to the *Bricklayers* case and did not thereby render a decision which presents a direct conflict with the Court of Appeals for the District of Columbia. Therefore an affirmation by this Court, of the Seventh Circuit decision which is based primarily upon the rationale of the *Wong* case, does not require that the distinction of the *Florida East Coast Railway* case be inoperative.

This Court has long held that, when a case has been decided by the Court of Appeals based on an erroneous view of the law, then the case will be remanded to the Court of Appeals for consideration of issues raised before it, but not decided by its initial decision. *U.S.* v. *Florida East Coast RR*, supra; *Central Hardware Co.* v. *NLRB*, 407 U.S. 539; *Accardi* v. *Pennsylvania Railroad*, 383 U.S. 225; *Tunstall* v. *Brotherhood of Locomotive*

Firemen, 323 U.S. 210; and *Marconi Wireless Telegraph* v. *Simon*, 246 U.S. 46. The primary reason that this Court has remanded for consideration by a Court of Appeals, is to obtain the benefit of the views of the Court of Appeals, after argument by the parties. The absence by the Court of Appeals of a ruling upon an issue that was argued before it, has the effect of removing that issue from the scope of the decision of this Court. Conversely where this Court affirms the decision of the Court of Appeals, based upon one argument presented to it, then other arguments not decided by the Court of Appeals are outside the application of an affirmation of this Court.

Thus, should this Court affirm the decision of the Seventh Circuit, the issue of an administrative law judge necessarily being required to hear the 10(k) hearings is not encompassed within this Court's order. Whether there would be a conflict between the Seventh Circuit and the Court of Appeals for the District of Columbia, will necessarily have to wait for another case. Therefore, the decision of this Court will not, in and of itself, necessarily require that the Labor Board begin assigning administrative law judges to hear the 10(k) hearings. The argument to that effect should be rejected by this Court.

V.

THE BOARD'S ARGUMENT THAT ITS VIEWS ON THE APPLICABILITY OF THE APA ARE ENTITLED TO GREAT WEIGHT IS WITHOUT MERIT.

The Board argues in Section I, D. of its Brief that its interpretation of the applicability of the APA, particularly §554, to its 10(k) proceedings, is entitled to great weight since its procedure was adopted in 1949. While it is true that, in general, the Court will give serious consideration to the decisions of an administrative agency on

the method by which it perform this function, the Labor Board has had a noticeably poor history insofar as interpreting Section 10(k) is concerned. The Labor Board had, for many years after the enactment of §10(k), declined to make an award designating which of the two competing unions was entitled to perform the disputed work. When this practice came before this Court, the Labor Board made the same argument in that case as it does here, to the effect that its interpretation of Section 10(k), and its procedures under that section, should be given great weight. That contention was rejected by this Court when it said, speaking through Mr. Justice Black, as follows:

> "The Board's final contention is that since its construction of §10(k) was adopted shortly after the section was added to the Act and has been consistently adhered to since, that construction has itself become a part of the statute by reason of Congressional acquiescence. In support of this contention, the Board points out that Congress has long been aware of its construction and yet does not see fit to adopt proposed amendments which would have changed it. In the ordinary case, this argument might have some weight. • • • •
>
> "We conclude that the Board's interpretation of its duty under Section 10(k) is wrong and that under that section it is the Board's responsibility and duty to decide which of two or more employee groups claiming the right to perform certain work tasks is right and then specifically to award such tasks in accordance with its decision. Having failed to meet that responsibility in this case, the Board could not properly proceed under Section 10(c) to adjudicate the unfair labor practice charge. The Court of Appeals was therefore correct in refusing to enforce the order which resulted from that proceeding." *NLRB* v. *Radio, Television Engineers Union Local 1212, I.B.E.W.*, 364 U.S. 573 at 585, 586.

This Court's rejection of the Board's argument as to its expertise in interpreting the statute which it is charged to enforce, is clear precedent to reject the Board's argument in the instant case, particularly since the Board asks this Court to accept its interpretation of not only Section 10(k) but of the provisions of the APA.[7]

Local 134 submits that this Court should reject out-of-hand the argument by the Labor Board, that its interpretation of the APA should be accepted by this Court. It is beyond question that the administrative agency's interpretation of the applicability of the APA to its own procedures is particularly inappropriate.

VI.

THE EFFECT OF THE SEVENTH CIRCUIT'S DECISION AND ITS AFFIRMANCE BY THIS COURT WILL RESULT IN NO HARDSHIP TO THE LABOR BOARD.

ITT, CWA, and the Labor Board have argued various alleged detrimental, practical effects of the Seventh Circuit decision. One such argument is the Congressional intent of expeditious handling of strikes involved in jurisdictional dispute matters. The statutory scheme, as conceded by ITT, CWA, and the Labor Board, is to resolve the strike or threatened strike by means of injunction from the Federal District Court pursuant to §10(l) of

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[7] The question of Congressional acquiescence as mentioned in the CBS case works against the Board's theory in that the Labor Board's procedures had been in existence prior to the amendment to the Administrative Procedure Act in 1966 and yet Congress had not seen fit to add as an exemption to the application of Section 554 the Board's jurisdictional dispute proceeding under Section 10(k).

the LMRA. This procedure was followed in the instant case (Main A. 57). It resulted in the completion of the disputed work in December 1970, long before the 10(k) was held in March 1971 (Main A. 9 & 13).

Once the threat of injunctive relief resulted in the completion of the disputed work, the need for expedition was satisfied. Thus, the determination by the Board in its 10(k) hearing, as to which of the two competing unions was entitled to perform the disputed work, was issued long after the disputed work had been completed. Further, the commingling of functions in the same attorney at the Labor Board's Regional Office, was not even alleged to have been an essential element to expedite either the 10(k) hearing or the subsequent unfair labor practice hearing. Therefore, this argument is without merit.

However, from a practical point of view, the Labor Board is easily capable of remedying the commingling of functions violation. ITT, CWA, and the Labor Board all argue in their Brief that rarely has the commingling function taken place. Local 134 submits that this is tacit recognition of the requirement of Section 554 of the APA, and is an argument in favor of Local 134's position rather than the positions advanced in their briefs. More importantly, it shows that the Labor Board will suffer no injury by following the prohibition against commingling of functions. Indeed, the Labor Board could easily issue an internal memorandum to its personnel ordering them to refrain from acting in both capacities, in the few cases where it might happen in the future.

Additionally, the Labor Board found the decision of the Seventh Circuit one which did not warrant its seeking a review by this Court, and therefore it did not file its own Petition for Certiorari. To the contrary, the Labor Board

chose to accept the Seventh Circuit decision and to close the file of the case which gave rise to the proceedings below (App. A.).

When the practical effects of the commingling of functions in the instant case are considered, Local 134 is the only party seriously harmed. Initially it had suffered the harm that results from the deprivation of the legal rights guaranteed in Section 554 of the APA. Further, Local 134 suffered serious detriment to the presentation of its case before the Labor Board in the 10(k) hearing, by having the subpoenas served upon ITT and CWA quashed by the hearing officer. Local 134 was forced to seek special permission to appeal from that hearing officer's ruling in the middle of the 10(k) hearing (Main A. 6 & 7). The Labor Board denied special permission to appeal on the last day of the 10(k) hearing (Main A. 8). Later, in its Decision and Determination of Dispute, the Labor Board affirmed the ruling of the hearing officer (Main A. 10 fn 1).

The Labor Board decided the jurisdictional dispute question without the substantial evidence which Local 134 was seeking by means of these subpoenas. In its determination the Labor Board based its award to CWA in the disputed work, primarily upon the existence of the collective bargaining agreement, concerning which Local 134 was seeking evidence (Main A. 16). The ruling by the hearing officer to quash the subpoenas was of great consequence to the presentation of Local 134's case. Further, this ruling by the hearing officer is a clear example of the conclusion of the Seventh Circuit that the one who hears the case has the power to shape the record upon which the subsequent decision will be made. Later, this same person acted as prosecutor to advocate the unfair labor practice complaint, and the Board's Decision and Deter-

mination of Dispute. It was this conduct which the Seventh Circuit found to violate both the letter and the spirit of the APA.

Finally, ITT, CWA, and the Labor Board have asked this Court to enforce the Labor Board's final order. These requests are inappropriate even if this Court denies enforcement to the decision of the Seventh Circuit.

The ruling by the hearing officer, which resulted in the denial to the Labor Board of the evidence concerning a substantial factor in its jurisdictional award, was the subject of Local 134's issue number 2 in its argument to the Seventh Circuit (Main A. 78). Thus, the decision of the Labor Board in the instant case was argued by Local 134 to be in direct conflict with a decision of the Sixth Circuit Court of Appeals decision in *NLRB* v. *Dayton Motels, Inc.*, 474 F.2d 328. However, the Seventh Circuit did not decide the question of the hearing officer and the Labor Board's refusal to consider the evidence sought to be obtained by Local 134 and introduced in support of its contentions, because it decided the case upon the violation of the APA. Consequently, an important issue raised to the Court of Appeals was not decided. As was argued above at p. 36, this Court has consistently remanded to the Court of Appeals those cases where unresolved issues of substance remain when this Court reverses the decision of the Court of Appeals.

VII.

CONCLUSION

For the reasons set out above, Local 134 requests that the decision of the Court of Appeals for the Seventh Circuit be affirmed by this Court.

However, should the Court disagree with the decision of the Seventh Circuit, the appropriate order of this Court would not be to enforce the Board's order or to remand to the Court of Appeals for enforcement as urged by ITT, CWA, and the Labor Board, because there remain undecided issues raised below by Local 134.

Respectfully submitted,

ROBERT E. FITZGERALD, JR.
EDWARD J. CALIHAN, JR.
53 West Jackson Boulevard
Chicago, Illinois 60604
Attorneys for Local 134, IBEW

APPENDIX A

NATIONAL LABOR RELATIONS BOARD
REGION 13
881 Everett McKinley Dirksen Building
219 Dearborn Street, Chicago, Illinois 60604

Telephone: (312) 353-7597

February 6, 1974

Robert E. Fitzgerald, Jr., Esq.
53 West Jackson Boulevard, Suite 1112
Chicago, Illinois 60604

Re: Local No. 134, International Brotherhood of Electrical Workers
(ITT Communications Equipment and Systems Division)
Case No. 13-CD-209

Dear Sir:

This is to advise you that we have closed our records in the above-entitled case.

Very truly yours,

Ross M. Madden
Regional Director

cc: John D. O'Brien, Esq.
Seyfarth, Shaw, Fairweather & Geraldson
111 West Jackson Boulevard
Chicago, Illinois 60604

Jerome Schur, Esq.
Katz & Friedman
7 South Dearborn Street
Chicago, Illinois 60603

Local Union No. 134, International Brotherhood of Electrical Workers, AFL-CIO
600 West Washington Street, Chicago, Illinois 60606

Communications Workers of America, AFL-CIO
7460 North Sheridan Road, Chicago, Illinois 60626

International Telephone & Telegraph Corp., Communications Equipment and Systems Division
191 Biesterfield Road, Elk Grove Village, Illinois 60007

ITT-Communications Equipment and Systems Division
60 Washington Street, Hartford, Connecticut 06106

APPENDIX B

Administrative Procedure Act 5 USC §701-706

§ 701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b) (2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency within the meaning of a relevant statute, is entitled to judicial review thereof.

§ 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

§705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a

case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(Slip Opinions)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

INTERNATIONAL TELEPHONE & TELEGAPH CORP., COMMUNICATIONS EQUIPMENT & SYSTEMS DIVISION *v.* LOCAL 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL–CIO

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 73–1313. Argued November 19, 1974—
Decided January 14, 1975

Petitioner employer filed an unfair labor practice charge against respondent union under § 8 (b) (4) (D) of the National Labor Relations Act (NLRA), which makes it an unfair labor practice for a labor organization to induce employees to strike to force an employer to assign particular work to employees in a particular labor organization. Section 10 (k) of the NLRA provides that whenever a § 8 (b) (4) (D) unfair labor practice charge is filed, the National Labor Relations Board shall hear and determine the dispute out of which such unfair labor practice arose, unless within 10 days after notice that such charge has been filed the parties submit evidence that they have adjusted the dispute, in which case or upon compliance with the Board's decision, such charge shall be dismissed. Pursuant to § 10 (k) a hearing was held before a hearing officer, and subsequently the Board rendered a decision adverse to respondent, which then indicated it would not comply therewith. The Board's General Counsel thereafter issued a complaint on the unfair labor practice charge, and at a trial examiner's hearing, at which the General Counsel was represented by the same attorney who had been the hearing officer in the § 10 (k) proceeding, the trial examiner concluded that respondent had violated § 8 (b) (4) (D), and the Board issued a cease-and-desist order. The Court of Appeals, on respondent's

Syllabus

petition to set aside the order, agreed that respondent had violated § 8 (b) (4) (D), but refused to enforce the order, on the ground that because the § 10 (k) hearing officer had participated in both the § 10 (k) and the § 8 (b) (4) (D) proceedings, the Board had not complied with § 5 of the Administrative Procedure Act (APA), which prohibits commingling prosecutorial and adjudicatory functions in agency proceedings, and generally applies to "every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing," § 2 (d) of the APA defining "adjudication" as "agency process for the formulation of an order," and "order" as "the whole or a part of a final disposition . . . of an agency in a matter other than rule making." *Held:* Section 5 of the APA does not govern proceedings conducted under § 10 (k) of the NLRA. Pp. 13–19.

(a) The § 10 (k) determination is not itself a "final disposition" within the meaning of "order" and "adjudication" in § 2 (d) of the APA. When Congress defined "order" in terms of a "final disposition," it required that "final disposition" to have some determinate consequences for the party to the proceeding, and here the Board does not order anybody to do anything at the conclusion of the § 10 (k) proceeding. Pp. 13–15.

(b) Nor is such determination "agency process for the formulation of an order" within the meaning of § 2 (d). Although important practical consequences in the § 8 (b) (4) (D) proceeding result from the Board's determination in the § 10 (k) proceeding, they do not alone make the § 10 (k) proceeding related to the § 8 (b) (4) (D) proceeding in a manner that would make the former "agency process" for the formulation of the order of the latter. The § 10 (k) proceeding is unlike the typical hearing before an administrative law judge which is then subject to consideration by the agency. The issues in a § 10 (k) proceeding are similar to but not identical with the focus of the § 8 (b) (4) (D) proceeding. The standard of proof is different, and the inquiry in a § 8 (b) (4) (D) proceeding is whether the union engaged in forbidden conduct with a forbidden objective. The proceedings are separate, and the agency makes the determination in each of them. Pp. 15–19.

486 F. 2d 863, reversed and remanded.

REHNQUIST, J., delivered the opinion for a unanimous Court.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 73-1313

International Telephone and Telegraph Corporation, Communications Equipment and Systems Division, Petitioner, *v.* Local 134, International Brotherhood of Electrical Workers, AFL-CIO.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[January 14, 1975]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

In 1947 Congress responded to the labor unrest caused by jurisdictional disputes by adding § 8 (b)(4)(D) to the National Labor Relations Act, which made it an unfair labor practice for a labor organization to induce the employees of any employer to strike in the hopes of forcing an employer to assign particular work to employees in a particular labor organization.[1] In the belief

[1] Labor Management Relations Act, 1947, 61 Stat. 136, 141-142. As amended by the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 542-543, § 8 (b)(4)(D), 29 U. S. C. § 158 (b)(4)(D), presently provides:

"(b) It shall be an unfair labor practice for a labor organization or its agents—

"(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise, handle or work on any goods, articles, materials, or com-

that resolution of jurisdictional disputes was more important to industrial peace than the imposition of unfair labor practice sanctions. *NLRB* v. *Radio & Television Broadcast Engineers Union, Local 1212*, 364 U. S. 573, 576–577 (1961) (hereinafter *CBS*). Congress at the same time enacted § 10 (k),[2] 29 U. S. C. § 160 (k), to induce unions to settle their differences without awaiting unfair labor practice proceedings and enforcement of Board orders by Courts of Appeals.

One year earlier Congress had responded to the many expressed concerns for fairness and regularity in the administrative process summarized in *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 36–41 (1950), by enacting the Administrative Procedure Act (Act).[3] Section 5 of the

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modities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

"(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work."

[2] 29 U. S. C. § 160 (k):

"(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 158 (b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed."

[3] 60 Stat. 237–244, as codified by An Act to Enact Title 5, U. S. C., 80 Stat. 378 (1966). Slight modifications in the APA sections under consideration in this case were made at the time of codification,

Act, 5 U. S. C. § 554, establishes requirements governing certain agency proceedings that come within the Act's definition of "adjudication." We granted certiorari to the Court of Appeals for the Seventh Circuit in this case, 416 U. S. 981 (1974), to review its conclusion that § 5 of the Act applied to a § 10 (k) proceeding conducted by the Board, 486 F. 2d 863 (1973). Another Court of Appeals had decided a short time earlier that such a Board proceeding was not subject to § 5 of the Act. *Bricklayers, Masons and Plasterers International Union of America* v. *NLRB*, 155 U. S. App. D. C. 47, 475 F. 2d 1316 (1973).

The case now before us arose out of a jurisdictional dispute between respondent Local 134 of the International Brotherhood of Electrical Workers (IBEW) and the Communications Workers of America (CWA) over whose members would perform certain telephone installation work in Cook County, Illinois. Petitioner International Telephone and Telegraph Corporation, which had a nationwide collective-bargaining agreement with the CWA, had established a communications equipment and systems division to sell and install private telephone systems.[4] In 1970 petitioner entered into a contract with the Village of Elk Grove, Illinois, for the installation and sale of a switching system and related telephone and circuitry work. Since employees of the Illinois Bell Telephone Company, who were members of Local 134 IBEW, had already run trunk lines from the local operat-

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but no substantive changes were intended. H. R. Rep. No. 901, 89th Cong., 1st Sess., 3 (1965); S. Rep. No. 1380, 89th Cong., 2d Sess., 18 (1966).

[4] The division was organized to take advantage of a ruling by the Federal Communications Commission that private telephone systems could be interconnected with an operating telephone company system. *Use of the Carterfone Device in Message Toll Telephone Service*, 13 F. C. C. 2d 420 (1968).

ing telephone system to the Administrative Office of the Village, petitioner's contract covered only the remaining two stages necessary to complete installation of the system. First the telephone cable had to be routed from the telephone room in the basement to the telephone instruments in particular rooms and offices by a process known as "pulling cable"; petitioner subcontracted this work to the C. A. Riley Electric Construction Company, whose employees are represented by respondent Local 134 IBEW. Second, by a process known as "terminating the cable," the cable would be connected to the telephone instruments. Petitioner planned to have its own technicians, who were represented by the CWA, perform this work.

C. A. Riley had hoped to perform the terminating work and inquired of petitioner's supervisor whether that was possible. The supervisor informed Riley of petitioner's plan to have its own employees do the work, and Riley told the supervisor that petitioner's representatives had better meet with the respondent's business agent. On two occasions petitioner's representatives met with the union business agent who told them that Local 134 IBEW installed all telephone equipment in Cook County and that CWA members would install no telephone equipment in Cook County. On the second occasion the respondent's business agent was quite explicit: "We'd better get that work or there will be trouble." [5]

When CWA employees appeared at the job site on December 3, 1970, to begin their portion of the work, all of respondent's members left their jobs.[6] That after-

[5] 197 N. L. R. B. 879, 881 (1972).

[6] The respondent's business agent had been notified the previous evening that petitioner's employees would begin their work on December 3. When petitioner's two employees reported to the basement telephone room for work, two of respondent's members, who were employed by the Illinois Bell Telephone Company, packed up

noon a representative of the Village of Elk Grove met with petitioner's regional sales manager, and they agreed to pull petitioner's employees off the job temporarily. Representatives of respondent were informed, and all Local 134 employees thereafter returned to work.[7]

On December 3, 1970, petitioner filed a charge alleging that respondent had violated § 8 (b)(4)(D) of the National Labor Relations Act, 29 U. S. C. § 158 (b)(4)(D). The Board's regional director found reasonable cause to believe that the charges had merit and proceeded in accordance with the language of § 10 (k):

> "Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 158 (b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satis-

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their tools and left because they would not work with CWA members. Respondent's steward entered the room and demanded to see petitioner's employees' union cards. When they could not produce Local 134 membership cards, the steward announced, "I can't work here" or "We can't work here." 197 N. L. R. B., at 881. After this comment, four or five employees of the Johnson Electric Company, who also were members of Local 134, drifted away. At a coffee break a few moments later, the steward told all the assembled members of Local 134 that he was going home because he did not want to work with "nonunion" men. The other Local 134 members also left the jobsite at that time, and none worked the job for the rest of the day.

[7] Petitioner's employees remained off the job until December 21, at which time they returned and performed the terminating work. Respondent's members, who had worked on the project as employees of Riley, Illinois Bell, and the Johnson Electric Company, had completed their work by December 21 so that no second confrontation occurred.

> factory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed."

Respondent was notified that a hearing would be conducted by a hearing officer [8] upon the dispute alleged in the charge, and the hearing was held on March 12, 15, and 17, 1971, with Stephen S. Schulson, an attorney in the regional office, presiding. All parties appeared at the hearing and were given full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues. In accordance with NLRB regulations, the record was transmitted to the Board for decision without any recommendation from the hearing officer.[9] The Board received briefs from petitioner, respondent, and the CWA, and concluded that employees represented by the CWA were entitled to perform the work in dispute. 191 N. L. R. B. 828 (1971). On August 30, 1971, respondent notified the Regional

[8] The Board's regulations provided that a "hearing officer" is "the agent of the Board conducting the hearing in a proceeding under section 9 or in a dispute proceeding under section 10 (k) of the act." 29 CFR § 102.6 (1971). A hearing officer "normally is an attorney or field examiner attached to the regional office but may be another qualified official." 29 CFR § 101.20 (c). The "hearing officer" is to be distinguished from a "trial examiner" who presides over unfair labor practice proceedings. 29 CFR § 102.6. The Board's current regulation is identical to the regulation in force at the time of the § 10 (k) proceeding of the present case except that the term "trial examiner" has been changed to "administrative law judge," 29 CFR § 102.6 (1974). See 37 Fed. Reg. 16787 (1972).

[9] The Board's regulations, 29 CFR § 101.34, require the hearing officer to transmit the record to the Board but provides that he shall "make[ ] no recommendations in regard to resolution of the dispute."

Director that it would not comply with the Board's § 10 (k) determination. The Regional Director, on behalf of the Board's General Counsel, then issued a complaint upon the § 8 (b)(4)(D) unfair labor practice charge that had been held in abeyance pending the attempt to resolve the dispute pursuant to the § 10 (k) proceeding. At the hearing before a trial examiner, the General Counsel was represented by the same attorney who had presided over the compilation of testimony for the Board in the § 10 (k) proceeding. The trial examiner concluded that respondent had violated § 8 (b)(4)(D) and he recommended that respondent be ordered to cease its unlawful conduct; exceptions were filed with the Board [10] which it overruled in ordering respondent to cease and desist from its unlawful conduct. 197 N. L. R. B. 879 (1972).

Respondent filed a petition to review and set aside the Board's order in the Court of Appeals for the Seventh Circuit, and the Board filed a cross-application for enforcement of its order.[11] The Court of Appeals found respondent's conduct to be "the very activity § 8 (b)(4)(D) was intended to prohibit," 486 F. 2d, at 866, but refused to enforce the Board's order because it decided that the Board had not complied with § 5 of the Administrative Procedure Act, 5 U. S. C. § 554.[12] The court

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[10] Exception 16 brought to the Board's attention the failure of the trial examiner to address respondent's argument that the Act had been violated by the participation of attorney Schulson in both the § 10 (k) and § 8 (b)(4)(D) proceedings. Since the issue of the applicability of the Act was presented to the Board, the Court of Appeals was entitled to consider the objection, and so are we. 29 U. S. C. § 160 (e)–(f).

[11] Title 29 U. S. C. § 160 (f), (e).

[12] Section 5 of the Act, 5 U. S. C. § 554:

"(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on

was under the impression that the parties had "admitted that § 554 applies to § 10 (k) hearings," 486 F. 2d, at 867, and regarded the participation by Schulson in both

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the record after opportunity for an agency hearing, except to the extent that there is involved—

"(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

"(2) the selection or tenure of an employee, except a hearing examiner appointed under section 3105 of this title;

"(3) proceedings in which decisions rest solely on inspections, tests, or elections;

"(4) the conduct of military or foreign affairs functions;

"(5) cases in which an agency is acting as an agent for a court; or

"(6) the certification of worker representatives.

"(b) Persons entitled to notice of an agency hearing shall be timely informed of—

"(1) the time, place, and nature of the hearings;

"(2) the legal authority and jurisdiction under which the hearing is to be held; and

"(3) the matters of fact and law asserted.

"When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

"(c) The agency shall give all interested parties opportunity for—

"(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

"(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

"(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—

proceedings as a violation of 5 U. S. C. § 554 (d), which prohibits commingling prosecutorial and adjudicatory functions. See n. 12, *supra*. Even though the Board had argued that the § 10 (k) proceeding "was without binding effect on anyone" so that "it was not improper for the same person to perform the functions of hearing officer and subsequently prosecute an unfair labor practice charge based upon the evidence adduced at that hearing," the Court of Appeals relied upon this Court's opinion in *NLRB* v. *Plasterers' Local Union No. 79*, 404 U. S. 116 (1971), to support its conclusion that "the hearing officer's rulings at the § 10 (k) hearing largely determine what evidence the Board will have to consider at the Unfair Labor Practice Hearing . . . ." 486 F. 2d, at 866–867. With that perspective, the Court of Appeals found the attorney's participation to be "plainly inconsistent with both the spirit and the letter of the Act." 486 F. 2d, at 868.

"(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

"(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

"An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply—

"(A) in determining applications for initial licenses;

"(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

"(C) to the agency or a member or members of the body comprising the agency.

"(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty."

I

To determine whether § 5 of the Administrative Procedure Act governs proceedings conducted under § 10 (k) of the National Labor Relations Act necessitates some understanding of both statutory provisions which, as noted above, were enacted within a year of each other. The Administrative Procedure Act was aptly described in *Wong Yang Sung, supra,* as "a new, basic and comprehensive regulation of procedures in many agencies," 339 U. S., at 36. The Court there further observed that the Act "contains many compromises and generalities and, no doubt, some ambiguities." 339 U. S., at 40–41. Because it was designed to regulate administrative proceedings throughout a wide spectrum of agency activities, its language is necessarily abstract in many places. The more we may know about the particular agency proceeding to which the Act is sought to be applied, the better we will be able to apply it.

The events leading up to the enactment of § 8 (b)(4)(D) and § 10 (k) have been recounted by this Court in *CBS, supra,* and *Plasterers' Local Union, supra,* and need not here be reviewed in detail. Congress made the judgment "that it is more important to industrial peace that jurisdictional disputes be settled permanently than it is that unfair labor practice sanctions for jurisdictional strikes be imposed upon unions." *CBS,* 364 U. S., at 577. Voluntary and therefore prompt resolution of such jurisdictional disputes is encouraged both by the 10-day grace period following notice of the filing of an unfair labor practice charge, and by the dismissal of such a charge if the union complies with the Board's adverse § 10 (k) determination. 29 CFR § 101.36.

To effectuate the congressional objective of prompt resolution of jurisdictional disputes, almost from the date of the enactment of § 10 (k) the Board has applied pro-

cedures to proceedings under that section that are quite different from those of a proceeding under § 8 (b)(4)(D). The § 10 (k) hearing is described in the Board's regulations:

> "If the parties have not adjusted the dispute or agreed upon methods of voluntary adjustment, a hearing, usually open to the public, is held before a hearing officer. The hearing is nonadversary in character, and the primary interest of the hearing officer is to insure that the record contains as full a statement of the pertinent facts as may be necessary for a determination of the issues by the Board. All parties are afforded full opportunity to present their respective positions and to produce evidence in support of their contentions. The parties are permitted to argue orally on the record before the hearing officer. At the close of the hearing, the case is transmitted to the Board for decision. The hearing officer prepares an analysis of the issues and the evidence, but makes no recommendations in regard to resolution of the dispute." 29 CFR § 101.34.

Streamlined procedures were both designed and justified because "the decision in the proceedings under Section 10 (k) is a preliminary administrative determination made for the purpose of attempting to resolve a dispute within the meaning of that section; the unfair labor practice itself is litigated at a subsequent hearing before a Trial Examiner in the event the dispute remains unresolved," *National Union of Marine Cooks and Stewards (Irwin-Lyons Lumber Co.)*, 83 N. L. R. B. 341 (1949).[13]

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[13] The Board has adhered consistently to this position. See, *e. g.*, *International Longshoremen's and Warehousmen's Union (General Ore, Inc.)*, 124 N. L. R. B. 626, 628–629 (1959):

"It is well established that Section 8 of the Administrative Procedure Act, which provides for the issuance of the initial decision by

The Board concluded from this analysis of the nature of the § 10 (k) proceeding that the provisions of the Administrative Procedure Act governing adjudications were not applicable. While an agency's interpretation of the Administrative Procedure Act may not be entitled to the same weight as the agency's interpretation of its own substantive mandate, see *United States* v. *Florida East Coast Railway Co.*, 410 U. S. 224, 236, n. 6 (1973), its characterization of its own proceeding is entitled to weight, and that characterization may in turn have rele-

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the hearing officer, does not apply to a proceeding under Section 10 (k). Under Section 101.30 of the Statements of Procedure and Section 102.80 of the Board's Rules and Regulations, Series 7, the hearing under Section 10 (k) is nonadversary in character and, according to the procedure adopted therefor, conducted in the same way as a hearing in a representation proceeding. The Board adopted such procedure because the decision under Section 10 (k) is a preliminary administrative determination made for the purpose of attempting to resolve a dispute within the meaning of that section. The unfair labor practice itself is litigated at a subsequent hearing before a Trial Examiner if the dispute remains unresolved. It is to the subsequent adversary proceeding, which leads to a final Board determination, that Section 8 of the Administrative Procedure Act applies. The primary function of the hearing officer, who is acting under the delegation of authority from the Board, in a nonadversary proceeding is to insure that the record contains a full statement of pertinent facts as may be necessary for the determination of the dispute by the Board. The hearing officer makes no recommendations in regard to the resolution of the dispute. While we think it better practice not to assign a Board agent who has previously engaged in the performance of investigative and prosecuting functions for the Agency to act as a hearing officer in the same or in a related case, we find that the Longshoremen in the instant case was not prejudiced by such assignment. The Longshoremen does not allege that it was denied the opportunity to present evidence in support of its contentions, or that it was prejudiced in any other manner by the conduct of the hearing officer." [Footnotes omitted.] In *Gen. Gal Ore*, unlike the present case, the hearing officer had previously represented the General Counsel in proceedings factually related to the § 10 (k) proceeding at which he *later* presided.

vance in determining the applicability of the Administrative Procedure Act.

II

The question which we must decide here is whether the § 10 (k) determination is an "adjudication" governed by § 5 of the Administrative Procedure Act, 5 U. S. C. § 554. The Court of Appeals did not consider in any detail whether § 5 of the Act governs § 10 (k) proceedings since it was under the impression that the parties had conceded the general applicability of this section to such hearings. 480 F. 2d, at 867. Petitioner and the Board contend that the Court of Appeals was mistaken with respect to any such concession, and state that they argued both in their principal briefs and in their petitions for rehearing that § 5 was not applicable. Respondent acknowledges that no such concession was made,[14] and we therefore address the issue on its merits.

If one were to start with the proposition that all administrative action falls into one of two categories, rule-making or adjudication, the § 10 (k) determination certainly is closer to the latter than to the former. But such light as we have on the intention of Congress when it enacted the Administrative Procedure Act does not indicate that this is a sound starting point. Knowledgeable authorities in this field observed shortly after passage of the Act that "certain types of agency action are neither rule making nor adjudication." Ginnane, "Rule Making," "Adjudication" and Exemptions under the Administrative Procedure Act, 95 U. Pa. L. Rev. 621, 633 (1947); Netterville, The Administrative Procedure Act: A Study in Interpretation, 20 Geo. Wash. L. Rev. 1, 33 (1951); Cf. Attorney General's Manual on the Administrative Procedure Act 40 (1947).

Section 5 of the Act applies "in every case of adjudi-

[14] Tr. of Oral Arg. 20.

cation required by statute to be determined on the record after opportunity for an agency hearing," [15] and § 2 (d) of the Act, 5 U. S. C. § 551 (7), defines "adjudication" as "agency process for the formulation of an order"; "order" is in turn defined as "the whole or a part of a final disposition . . . of an agency in a matter other than rule making but including licensing," 5 U. S. C. § 551 (6). While one might argue that an intermediate proceeding within an agency is necessarily a "part" of a "final order," we think a sounder interpretation of the language Congress used is that the phrase "whole or a part" refers to components of that which is itself the final disposition required by the definition of "order" in § 2. Intermediate proceedings within an agency may be subject to the provisions of § 5 of the Act, however, by virtue of the fact that they are "agency process for the formulation of an order" rather than because their product is a "part" of the final disposition. Thus if the Board's § 10 (k) determination is itself a "final disposition" of a Board proceeding or is "agency process for the formulation" of an order in a resulting § 8(b)(4)(D) proceeding, then the § 10 (k) proceeding is governed by § 5 of the Act.

In a tautological sense, of course, the Board's determination in a § 10 (k) proceeding is a "final disposition" of *that* proceeding, but we think that when Congress de-

[15] The Board, which did not join with petitioner in seeking review of this case but is nevertheless a party to the case under Supreme Court Rule 21 (4), urges that even if the § 10 (k) proceeding is an "adjudication" under the Act, the language in § 10 (k) directing the Board "to hear and determine the dispute" is not sufficient to bring the proceeding within the language of § 5 of the Act which operates in the case of adjudications "required by statute to be determined on the record after opportunity for an agency hearing." In light of our disposition of the case it is unnecessary to address this contention.

fined "order" in terms of a "final disposition," it required that "final disposition" to have some determinate consequences for the party to the proceeding. The Board does not order anybody to do anything at the conclusion of a § 10 (k) proceeding. As the Attorney General's Manual on the Administrative Procedure Act 40 (1947) observed: "[I]nvestigatory proceedings, no matter how formal, which do not lead to the issuance of an order containing the element of final disposition as required by the definition, do not constitute adjudication." This Court noted in *Plasterers' Local Union, supra*, 404 U. S., at 126, that "the § 10 (k) decision standing alone, binds no one." We conclude, therefore, that the § 10 (k) determination is not itself a "final disposition" within the meaning of "order" and "adjudication" in § 2 of the Act.

Respondent's principal argument for affirmance of this case rests on the contention that although the § 10 (k) determination may not itself be a "final disposition," and therefore an "order," it is "agency process for the formulation" of the ultimate § 8 (b)(4)(D) order that the Board may issue.

There are undoubtedly important practical consequences in the § 8 (b)(4)(D) proceeding that result from the Board's determination in the § 10 (k) proceeding. These were described in the following language in *Plasterers' Local Union, supra*, 404 U. S., at 126–127:

> "[T]he impact of the § 10 (k) decision is felt in the § 8 (b)(4)(D) hearing because for all practical purposes the Board's award determines who will prevail in the unfair labor practice proceeding. If the picketing union persists in its conduct despite a § 10 (k) decision against it, a § 8 (b)(4)(D) complaint issues and the union will likely be found guilty of an unfair labor practice and be ordered to cease and desist. On the other hand, if that union wins the

§ 10 (k) decision and the employer does not comply, the employer's § 8 (b)(4)(D) case evaporates and the charges he filed against the picketing union will be dismissed. Neither the employer nor the employees to whom he has assigned the work are legally bound to observe the § 10 (k) decision, but both will lose their § 8 (b)(4)(D) protection against the picketing which may, as it did here, shut down the job. The employer will be under intense pressure, practically, to conform to the Board's decision. This is the design of the Act; Congress provided no other way to implement the Board's § 10 (k) decision." (Footnote omitted.)

But we do not think that such practical consequences alone make the § 10 (k) proceeding related to the § 8 (b)(4)(D) proceeding in a manner that would make the former "agency process" for the formulation of the order in the latter. The prototype of an intermediate proceeding that is "agency process for the formulation of an order," is a hearing before an administrative law judge who makes findings of fact and conclusions of law, initially decides the case, and whose recommended decision "becomes the decision of the agency . . . unless there is an appeal to, or review on motion of, the agency." 5 U. S. C. § 557 (b). All of the parties to this case, for instance, agree that the § 8 (b)(4)(D) unfair labor practice hearing before the trial examiner (now administrative law judge) was subject to § 5 since it was "agency process for the formulation of an order."

The relationship between the § 10 (k) proceeding and the § 8 (b)(4)(D) proceeding, however, is quite distinct from the relationship between the hearing before an administrative law judge and ultimate review of his findings and recommendations by the agency. The § 10 (k) proceeding has a life of its own from the time that testi-

mony is taken in the field by a hearing officer until the time the Board, with the record of the testimony before it but with no proposed findings or conclusions or recommendations from the hearing officer, reaches its own determination. The Board's attention in the § 10 (k) proceeding is not directed to ascertaining whether there is substantial evidence to show that a union has engaged in forbidden conduct with a forbidden objective. Those inquiries are left for the § 8 (b)(4)(D) proceeding.[16] Indeed, the Board's § 10 (k) determination is not unlike an advisory opinion, since the matter may well end there. If the Board determines that employees of the charged union are entitled to the work, the § 8 (b)(4)(D) charge against it will be dismissed. 29 CFR § 102.91. If the Board determination is adverse to the charged union and the union accedes, the § 8 (b)(4)(D) charge will be dismissed and the General Counsel will not issue a complaint. *Ibid.* Only if the union indicates that it will not comply with the Board's determination are further proceedings necessitated, and those proceedings will be under § 8 (b)(4)(D), not § 10 (k). As this Court ob-

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[16] The Board's powers under § 10 (k) depend upon whether there is reasonable cause to believe that § 8 (b)(4)(D) has been violated. In the present case the Board reviewed the record compiled by the hearing officer and concluded that the requisite reasonable cause existed. The respondent suggested that certain testimonial evidence was incredible, but the Board observed:

"In a jurisdictional dispute context, the Board is not charged with finding that a violation did in fact occur, but only that there is reasonable cause to believe that there has been a violation. On this testimony, and without ruling on the credibility of the testimony in issue, we are satisfied that there is reasonable cause to believe that a violation of Section 8 (b)(4)(D) has occurred." 191 N. L. R. B., at 830 (footnotes omitted).

By contrast, a union can be found guilty of committing an unfair labor practice only if a violation is established by a preponderance of the evidence. 29 U. S. C. 160 (e).

served in *Plasterers' Local Union, supra,* 404 U. S., at 122, n. 10:

> "The § 10 (k) determination is not binding as such even on the striking union. If that union continues to picket despite an adverse § 10 (k) decision, the Board must prove the union guilty of a § 8 (b)(4)(D) violation before a cease-and-desist order can issue. The findings and conclusions in a § 10 (k) proceeding are not *res judicata* on the unfair labor practice issue in the later § 8 (b)(4)(D) determination. *International Typographical Union,* 125 N. L. R. B. 759, 761 (1959). Both parties may put in new evidence at the § 8 (b)(4)(D) stage, although often, as in the present cases, the parties agree to stipulate the record of the § 10 (k) hearing as a basis for the Board's determination of the unfair labor practice. Finally, to exercise its powers under § 10 (k), the Board need only find that there is reasonable cause to believe that a § 8 (b)(4)(D) violation has occurred, while in the § 8 (b)(4)(D) proceeding itself the Board must find by a preponderance of the evidence that the picketing union has violated § 8 (b)(4)(D). *International Typographical Union, supra,* at 761 n. 5 (1959)."

In each case it is the agency itself, the National Labor Relations Board, which makes the ultimate determination. The same issues will generally be relevant, the record of the earlier proceeding will be admitted in the later one, 29 CFR § 102.92, and the Board's ruling on the merits of those issues which are common to the two proceedings is likely to be the same in the one as in the other. But the proceedings are nonetheless separate; the same tribunal finally determines each of them.

Were we to adopt respondent's position that merely because § 10 (k) determination has a significant prac-

tical effect on the § 8 (b)(4)(D) proceeding, it was therefore "agency process for the formulation" of the § 8 (b)(4)(D) order, we might well sweep under the definition of that term numerous ancillary agency proceedings that are distinct from the adjudications on which they have an effect, and which the language of the Act does not appear to have been designed to reach. We therefore decline to adopt that position. We accordingly conclude that a § 10 (k) determination is neither itself a final disposition under the definitional section of the Administrative Procedure Act, nor is it "agency process leading to the formulation of an order" within the meaning of that section. Proceedings under this section are therefore not governed by § 5 of the Administrative Procedure Act.

Although the Board's § 10 (k) proceedings need not be conducted pursuant to § 5 of the Administrative Procedure Act, the agency remains "free under the Act to accord litigants appearing before it more procedural rights than the Act requires," *Florida East Coast Railway Co., supra*, 410 U. S., at 236 n. 6.[17] The Board's procedures are of course, constrained by the Due Process Clause of the Fifth Amendment, but respondent has raised no contention that attorney Schulson's participation in both proceedings approached a constitutional violation.[18]

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[17] The Board indicates that "[i]t is not general practice to use the same person who hears the Section 10 (k) case to investigate and prosecute the subsequent Section 8 (b)(4)(D) case." Memorandum for the NLRB 4, n. 4.

[18] There is a suggestion in the opinion of the Court of Appeals that the Board's order should not be enforced even if the Act does not govern the § 10 (k) proceeding because the commingling of functions was "incompatible with the accepted norms for the proper administration of justice." 486 F. 2d, at 868. Cf. *Wong Yang Sung, supra*. In the present case, however, attorney Schulson prosecuted

The judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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the case for the general counsel *after* he had presided at the § 10 (k) proceeding. Even if it be assumed that his function at the § 10 (k) proceeding was judicial in nature, it is hard to see how this sequence of events would present the danger of commingling which the Court of Appeals saw. The Court of Appeals may have confused "hearing officers" with "trial" or "hearing examiners" (now "administrative law judges") who are ordinarily required to make recommended decisions, 5 U. S. C. § 557 (b), and who must be appointed pursuant to 5 U. S. C. § 3105. 486 F. 2d, at 867, n. 3.